No. 2360

United States
Circuit Court of Appeals
For the Ninth Circuit.

THE BEATSON COPPER COMPANY, a Corporation,

Plaintiff in Error,

vs.

JOHN PEDRIN,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Territory of Alaska, Third Division.

FILMER BROS. CO. PRINT. 330 JACKSON ST., S. F., CAL.

Records of U.S. Circuit Court of Appeals

506

No. 2360

United States
Circuit Court of Appeals
For the Ninth Circuit.

THE BEATSON COPPER COMPANY, a Corporation,

Plaintiff in Error,

vs.

JOHN PEDRIN,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Territory of Alaska, Third Division.

FILMER BROS. CO. PRINT, 330 JACKSON ST., S. F., CAL.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and. likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

Index. Page

Index. Page

In the District Court for the Territory of Alaska, Third Division.

Names and Addresses of Attorneys of Record.

E. E. RITCHIE, Valdez, Alaska,
Attorney for Plaintiff and Appellee, John, Pedrin.

R. J. BORYER, Cordova, Alaska,
Attorney for Defendant and Appellant, The Beatson Copper Company, a Corporation. [1*]

In the District Court for the Territory of Alaska, Third Division.

No. 633.

JOHN PEDRIN,
Plaintiff,

vs.

THE BEATSON COPPER COMPANY, a Corporation,
Defendant.

Complaint.

Plaintiff alleges:

I.

That defendant is a corporation engaged in operating a mine on Latouche Island, Prince William Sound, Territory of Alaska.

II.

Part of the operation of said mine is conducted by detaching the ore body and adjacent earth and rock from the walls of a large cavity called a "glory hole"

*Page-number appearing at foot of page of original certified Record.

by the use of dynamite inserted into drill holes and discharged, according to usual mining custom. After firing a charge or "shot" of dynamite in the walls of the glory hole it usually happens that portions of the wall are loosened but do not fall with the mass brought down by the dynamite discharge. It is the rule absolutely required by safe mining, and usually followed at defendant's mine, after a "shot" is fired to make a careful examination of adjacent walls from which fragments might fall upon men working near, and to "bar down" or pry loose with crowbars all loosened portions of the wall. These precautions for insuring a safe place for miners and laborers to work are recognized rules of careful and safe mining and constitute a duty devolving upon the mine operator and his vice-principal, [2] the foreman of the shift boss directing the work.

III.

On or about February 1, 1913, plaintiff was working for the defendant as a mucker in said glory hole on the night shift, beginning after dark, at 7 o'clock P. M. A short time before plaintiff began work on said shift a powder charge had been fired in one side of said glory hole to bring down ore and rock. After the mass of ore, rock and earth severed from the wall by said shot had fallen, defendant negligently, recklessly and wrongfully failed and neglected to make sufficient examination of the wall from which said rock and earth had been detached and to "bar down" all loose rock and earth adhering to said wall. When plaintiff began work on the night shift at seven P. M. he had no knowledge of the condition of

the wall or of the fact that defendant had failed to take the usual and proper precautions for the protection of the men working in said glory hole by carefully removing from the wall all loose portions unsettled by the shot before mentioned and still adhering thereto. Plaintiff's work was that of "bulldozing" or breaking large rocks with powder at the bottom of the glory hole. From 11:30 P. M. to 12:30 A. M. plaintiff was off duty at dinner, and while he was absent from the glory hole a dynamite charge in a portion of the wall adjacent to that where the afternoon shot had been fired, as an effect of which rock and earth were still further loosened in that part of the wall last mentioned. Immediately after plaintiff returned to work in the glory hole at 12:30 A. M. several tons of rock and earth loosened by the afternoon shot and further loosened by the adjacent shot fired a few minutes before, suddenly, without warning, and with great velocity and force, fell upon plaintiff, who was stooping over at his work, before he had time to move out of its way, causing plaintiff the following injuries, to wit, the humerus of plaintiff's left arm was broken and the flesh and muscles of said arm above the elbow were severely contused and lacerated; a deep gash several inches long was cut through the [3] flesh to and into the bone along plaintiff's sternum from a point just below the clavicle, severing ligaments attaching several ribs to the sternum, the same source of injury severely lacerating and contusing the flesh and muscles along said gash and below it; a deep and ragged cut was made in the upper left breast between the shoulder and nipple

lacerating the flesh and severing the muscles; a gash four inches long was cut to the bone from the temple down to the cheek. Plaintiff lay in the hospital at Latouche for more than three months before he was able to leave his bed. During nearly all of that time plaintiff's arm was confined in a plaster cast, and his body was closely bound so as to prevent the moving of muscles that by action would open the cuts and lacerations of the body heretofore described. Plaintiff remained in the hospital nearly six months before he was sufficiently recovered to be discharged. During his confinement in said hospital plaintiff suffered great and constant physical pain and anguish of mind, and for some time after he was discharged continued to be sick, sore, lame and disordered. Plaintiff is not yet able to perform manual labor which puts any strain upon his left arm and upper body where he sustained the injuries complained of, and he still suffers pain when he exerts the said injured parts. Plaintiff believes that his injuries are to some degree permanent, that he will never fully recover therefrom and attain the same health and strength he possessed before suffering said injuries. At the time of suffering said injuries plaintiff was a strong able-bodied man, thirty-three years of age, a miner by occupation, at which employment he was able to earn, and when opportunity offered had earned, and received the highest going wages as a miner, having at times received four dollars a day and board. At the time of his said injury he was receiving two dollars and a half per day and board from defendant corporation. For more than six months

after his said injuries plaintiff was [4] unable to engage in any gainful occupation or to perform any work by which he could earn a livelihood, and he is now unable and will remain unable for a long time to come to work at his regular occupation as a miner, and may never be able to do so; he is able now only to perform inferior and menial tasks not requiring great strength, and in performing such work he often suffers great pain resulting from exertion and strain of the injured parts of his body and left arm.

IV.

Plaintiff alleges that while working on the shift in said mine as hereinbefore recited he was under the immediate direction and orders of one Green, whose first name is to plaintiff unknown, who was then and there shift boss or foreman of said work and vice-principal of defendant corporation, and it was the duty of said foreman acting for defendant corporation to provide a reasonably safe place to work for the men under his direction by taking all reasonable precautions for their protection, and in discharge of such duty it was incumbent upon him to see and provide that after a shot was fired in the wall of said glory hole no loosened fragments were allowed to remain upon the wall from which they might without warning become detached. Plaintiff alleges that said foreman and vice-principal willfully and negligently and recklessly failed to discharge said duty in this instance, and that his said wrongful neglect was the direct and proximate cause of plaintiffs' said injuries. Plaintiff alleges that when he went to work on the night shift as aforesaid the said glory

hole was very dark and it was necessary to perform his said work of bulldozing by the light of a lantern which was held for him by another man; that he had no knowledge of [5] the unsafe condition of said wall and no means of knowledge in the ordinary course of his employment; that when he returned to work in said glory hole after dinner at about 12:30 A. M. as aforesaid he had no knowledge of the fact that the wall above his place of work was in a dangerous condition, and had no means in the ordinary course of his employment of acquiring knowledge of that fact; that he was ordered by said foreman to resume immediately his work of bulldozing at the bottom of the glory hole and was so engaged and was working by the light of a lantern held by a co-employee, named John Schmidt, and commonly called "Russian John," when the mass of rock and earth fell upon him from said wall as hereinbefore described.

V.

Plaintiff alleges that by reason of the injuries so suffered by him as hereinbefore described he has been damaged in the sum of Ten Thousand Dollars.

WHEREFORE plaintiff prays judgment against the defendant, the Beatson Copper Company, for the sum of Ten Thousand Dollars ($10,000), his damages so as aforesaid sustained, and for the costs of this action.

E. E. RITCHIE,
Attorney for Plaintiff.

United States of America,
Territory of Alaska,—ss.

John Pedrin, being duly sworn, says he is the

plaintiff in this action; that he has read the foregoing complaint and he believes the same to be true.

JOHN PEDRIN.

Subscribed and sworn to before me this 20th day of September 1913.

[Seal] ANTHONY J. DIMOND,
Notary Public.

My commission expires Mar. 13, 1917. [6]

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Sept. 20, 1913. Arthur Lang, Clerk. [7]

In the District Court for the Territory of Alaska, Third Division.

No. 633.

JOHN PEDRIN,

Plaintiff,

vs.

THE BEATSON COPPER COMPANY, a Corporation,

Defendant.

Answer.

The Beatson Copper Company, a corporation, for answer to the complaint in this action says:

I.

Answering paragraph I of the complaint, admits all of the allegations contained therein.

II.

Answering paragraph II of the complaint, admits that part of the operation of its mine is conducted

by detaching the ore body and adjacent earth and rock from the walls of a large cavity called the glory hole by use of dynamite inserted into drill holes and discharged.

Says that it has no knowledge or information sufficient to form a belief as to all other allegations set out in paragraph II; therefore denies same.

III.

Answering paragraph III defendant admits that the plaintiff was working for the defendant on or about February 1st, 1913, but says that it does not have knowledge or information sufficient to form a belief as to each and all of the other allegations alleged in paragraph III of the complaint, therefore denies same.

IV.

Answering paragraph IV defendant says that [8] it does not have knowledge or information sufficient to form a belief as to each and all of the allegations contained therein; therefore denies same.

V.

Answering paragraph V defendant denies each and all of the allegations contained therein.

AFFIRMATIVE DEFENSES.

I.

Defendant for first affirmative defense alleges that if the plaintiff was injured at the time and place set out in his complaint, that such injuries arose from and grew out of risks incident to his employment and which the plaintiff assumed.

II.

That if plaintiff was injured at the time and place

mentioned in his complaint, that such injuries were due to the negligence of the plaintiff himself *and or* by the negligence of a fellow-servant.

WHEREFORE defendant prays that this action be dismissed and that it be allowed its costs and disbursements in this action.

R. J. BORYER,
Attorney for Defendant.

United States of America,
District of Alaska,—ss.

R. J. Boryer, being first duly sworn, upon his oath deposes and says that he is attorney for the Beatson Copper Company, the defendant herein; that he has read the above answer, knows its contents and believes same to be true. That this verification is made by him for the reason that the officers of the defendant company are about seventy miles distant and this affiant is unable to secure their verification, and for the further reason that E. E. Ritchie, attorney for [9] plaintiff, has consented that this answer can be verified by this affiant and that he would waive verification as required by the statutes.

R. J. BORYER.

Subscribed and sworn to before me this 20th day of October, A. D. 1913.

[Seal] THOS. P. GERAGHTY,
Notary Public.

My commission expires Feb. 13th, 1915.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Oct. 21, 1913. Arthur Lang, Clerk. By K. L. Monahan, Deputy. [10]

In the District Court for the Territory of Alaska, Third Division.

No. 633.

JOHN PEDRIN,

Plaintiff,

vs.

THE BEATSON COPPER COMPANY a Corporation,

Defendant.

Motion for Nonsuit.

Comes now the defendant, the Beatson Copper Company, by its attorney, R. J. Boryer, and moves the Court for a nonsuit in this action for the following reasons:

I.

Because the plaintiff alleges in his complaint that he is an experienced miner, capable of earning the highest wages for mining; that his evidence shows that he has followed mining for several years; that he had worked in and around the place where he was injured ever since beginning work for the defendant company, and had been working in the pit or hole where the accident occurred for about two weeks and knew the conditions surrounding the place where he was working; that he admitted he had seen the driller bore the holes and load same and heard the shots fired at the place or point where his injury happened and which shot or shots the plaintiff claims in his complaint was the cause of the earth falling and injuring the plaintiff.

II.

For the further reason that the plaintiff himself, although being an experienced miner and knowing that the shots complained of in his complaint had been fired at the place mentioned in his complaint, which caused the injury, proceeded to work without either examining or in any other manner trying to [11] ascertain the condition of the place where he was going to work.

III.

For the further reason that the plaintiff has failed to show or establish what relation, if any, the foreman or shift boss bore to the defendant and the duties, responsibility and authority of said foreman of shift boss in connection with the defendant company while the evidence does show that said foreman or shift boss in connection with the defendant comalong with the plaintiff and was a fellow-servant.

IV.

For the further reason that the plaintiff has failed to show that the defendant company was negligent in any manner and has failed to establish and make out a case against this company.

R. J. BORYER,
Attorney for Defendant.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Nov. 10, 1913. Arthur Lang, Clerk. By Thos. P. Geraghty, Deputy. [12]

In the District Court for the Territory of Alaska, Third Division.

No. 633.

JOHN PEDRIN,

Plaintiff,

vs.

THE BEATSON COPPER COMPANY a Corporation,

Defendant.

Motion for Directed Verdict.

Comes now the defendant, the Beatson Copper Company, by its attorney, R. J. Boryer, and moves the Court to direct a verdict in favor of the defendant for the following reasons:

I.

Because the plaintiff alleges in his complaint that he is an experienced miner, capable of earning the highest wages for mining; that his evidence shows that he has followed mining for several years; that he had worked in and around the place where he was injured ever since beginning work for the defendant company and had been working in the pit or whole where the accident occurred for about two weeks, and knew the conditions surrounding the place where he was working; that he admitted he had seen the driller bore the holes and load same and heard the shots fired at the place or point where his injury happened, and which shot or shots the plaintiff claims in his complaint was the cause of the earth falling and injuring the plaintiff.

II.

For the further reason that the plaintiff himself, although being an experienced miner and knowing that the shots complained of in his complaint had been fired at the place mentioned in his complaint, which caused the [13] injury, proceeded to work without either examining or in any other manner trying to ascertain the condition of the place where he was going to work.

III.

For the further reason that the plaintiff has failed to show or establish what relation, if any, the foreman or shift boss bore to the defendant, and the duties responsibility and authority of said foreman or shift boss in connection with the defendant company, while the evidence does show that said foreman or shift boss was engaged in a common employment along with the plaintiff and was a fellow-servant.

IV.

For the further reason that the plaintiff has failed to show that the defendant company was negligent in any manner and has failed to establish and make out a case against this defendant.

V.

For the further reason that the defendant in its affirmative defense alleges and pleads that if the plaintiff was injured, such injuries arose from and grew out of the risks incident to his employment and which the plaintiff assumed, also pleading as an affirmative defense that if said plaintiff was injured, such injuries were due to the negligence of the plain-

tiff himself and or by the negligence of a fellow servant; that the plaintiff has failed, neglected and refused to deny or otherwise plead to said affirmative defenses, thereby admitting same.

R. J. BORYER,
Attorney for Defendant.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Nov. 11, 1913. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. [14]

[Bill of Exceptions.]

Filed in the District Court, Territory of Alaska, Third Division. Dec. 17, 1913. Arthur Lang, Clerk. By K. L. Monahan, Deputy.

In the District Court for the Territory of Alaska, Third Division.

No. 633.

JOHN PEDRIN,

Plaintiff,

vs.

THE BEATSON COPPER COMPANY, a Corporation,

Defendant.

TRANSCRIPT OF RECORD.

BE IT REMEMBERED, that the above-entitled cause came on duly and regularly to be heard on Monday, the tenth day of November, 1913, at 10 o'clock A. M. before the Honorable F. M. BROWN, Judge of said Court, and a jury:

The plaintiff being represented by his attorney and counsel, E. E. RITCHIE, Esq.:

The defendant being represented by its attorney and counsel, R. J. BORYER, Esq.:

A jury having been empaneled, an opening statement was made by Mr. Ritchie on behalf of the plaintiff, Mr. Boryer waiving any statement on behalf of the defendant.

WHEREUPON the following additional proceedings were had: [15]

INDEX.

*Page-number of Original Certified Transcript of Record.

†Original page-number in Bill of Exceptions as same appears in Original Certified Transcript of Record.

Exceptions Taken by Defendant During Examination of Jurors.

Examination of Juror T. J. Lane.

(By Mr. BORYER.)

Q. Are you acquainted with the plaintiff in this case? A. No.

Q. Are you acquainted with the defendant corporation? A. No.

Q. Have you heard anything of the facts in the case? A. No.

Q. Have you any bias or prejudice against corporations? A. No.

Q. Do you feel if you were retained as a juror in this case that you could give them the same consideration as you would an individual?

A. Yes, sir.

Q. Are you acquainted with Mr. Ritchie?

A. Yes.

Q. The relation of attorney and client doesn't exist between you? A. No.

Mr. BORYER.—We pass the juror for cause.

(By Mr. RITCHIE.)

Q. When you lived at Katalla were you identified in any way with the Katalla Company? A. No.

Q. You never have done any business with those companies? A. No, sir.

Mr. BORYER.—At this time I desire to interpose an objection to the questions pertaining to the Katalla Company or the [17—2] Copper River & Northwestern Railway Co. or any company other than the Beatson Copper Co.

Mr. RITCHIE.—It is only to lay the foundation of a peremptory challenge if it became necessary. I might object to his asking these jurors whether the relation of attorney and client exists between the jurors and myself, because that is not a necessary disqualification.

By the COURT.—I think it is proper to determine the character of employment the juror may have had and as affecting his feeling in cases of this kind. The objection will be overruled.

To which ruling of the Court counsel for defendant then and there duly excepted; exception allowed.

By the COURT.—The jurors will be cautioned that it has nothing to do with this case—it doesn't matter whether one of the jurors or anyone else worked for the Katalla Company or any other company,—the only issue in this case is the Beatson Copper Co., and you should not allow any matter of that kind to prejudice your minds.

Mr. RITCHIE.—I particularly avoided the use of the generic term by which those companies are commonly known.

Mr. BORYER.—We desire to take an exception to the remark of counsel. Exception allowed.

Examination of Juror W. Thomas.

(By Mr. BORYER.)

Q. You reside in Valdez? A. Yes, sir.

Q. How long have you resided in Valdez?

A. A little over five years.

Q. What is your occupation? [18—3]

A. Meat-cutter.

Q. Are you acquainted with the plaintiff in this

case? A. I have seen him several times.

Q. Are you acquainted with the defendant, the Beatson Copper Company? A. No, I think not.

Q. Are you acquainted with Mr. Van Campen?

A. No.

Q. Have you heard any of the facts in this case?

A. I can't say I have, no; I heard of the case, that there was such a case pending, that is all.

Q. You have not heard any of the facts in the case? A. Not that I know to be the facts; no.

Q. You have heard the case talked of?

A. I heard some of the boys speak of it down here.

Q. Heard who?

A. One of the boys that worked down at the mine.

Q. Did he go into details, how it happened?

A. No.

Q. Where was it you heard this conversation?

A. Here in Valdez.

Q. Between whom? A. Mr. Florence.

Q. Who was doing the talking, the plaintiff?

A. No.

Q. Do you recall who it was?

A. Florence was the party's name that was telling me about it—I think he happened to be working down there last winter.

Q. From what you have heard, do you feel that you could sit as a juror in this case? [19—4]

A. I can't say that I should sit; no.

Q. You think you have formed impressions from what you have heard that it would take evidence to remove? A. To a certain extent, yes.

Q. And you don't feel, then, that you should sit as a juror? A. Why, no, I do not.

Q. You have formed an opinion from what you heard at that time? A. Slightly.

Q. It would take some evidence to remove it?

A. Some evidence.

Mr. BORYER.—We challenge the juror for cause.

(By Mr. RITCHIE.)

Q. Is Mr. Florence the young man who used to work in the post-office here? A. Yes, sir.

Q. He was working for the Beatson Copper Co. at the time this accident happened?

A. I wouldn't say whether he was working there at the time or whether he heard it; he told me there was such a case pending,—that is about all I can say.

Q. Did he claim to know the facts?

A. I couldn't say he did.

Q. Did he give you a pretty general idea of what the case was like and what the evidence would probably be? A. Yes, sir.

Q. So you have now you think an opinion as to the merits? A. Yes, somewhat.

Q. So that you could not start on the trial of the case as an absolutely impartial juror? [20—5]

A. No, I could not.

Q. Suppose at a very early stage of the trial it appeared that the purported facts already stated to you were wholly wrong, could you then try the case as though you had never heard anything regarding it? A. Yes.

By the COURT.—Do you feel that you could lay aside any opinion you may have and absolutely disregard it and try the case and decide it entirely on

the evidence that you hear here in the courtroom?

A. Yes, sir.

By the COURT.—The challenge will be denied.

Defendant is allowed an exception to the ruling. [21—6]

[Testimony of John Pedrin, the Plaintiff, in His Own Behalf.]

JOHN PEDRIN, the plaintiff, called and sworn as a witness in his own behalf, testified as follows:

Direct Examination.

(By Mr. RITCHIE.)

Q. What is your name? A. John Pedrin.

Q. Are you the plaintiff in this action?

A. Yes, sir.

Q. Where were you born?

A. I was born in California, San Diego.

Q. How old are you? A. I am over 34 now.

Q. What has been your occupation since you have been grown up?

A. Well, I have been following the mines—fireman, working in the mines and firing.

Q. Where have you worked in mines?

A. I worked in Alaska, in Gray's.

Q. E. F. Gray's? A. Yes, sir.

Q. Whereabouts?

A. The property he has got above the Bonanza, above the Kennecott, the glaciers.

Q. Where else have you worked?

A. I worked in another prospect there that Iverson had, right in Kennecott there—I worked a couple of months there.

(Testimony of John Pedrin.)

Q. How long have you been in Alaska?

A. About eight years.

Q. Have you been working as a miner during all or most of that time?

A. No, sir, I haven't worked always in mining—I have worked [22—7] on the railroad. I worked over in Kennecott in the Bonanza mine,—not in the mine, but in the camp there; I worked for Mr. O'Neil and I worked at Miles Glacier, 49.

Q. On the railroad? A. Yes.

Q. You mean O'Neil who used to be a foreman on the railroad?

A. Yes, at that bridge and I worked all over, wherever I got a job I went to work.

Q. Are you an experienced miner, that is, do you understand all ordinary mining work?

A. I am no machine-man, but I can work in the mine—I have always been a hammer-man, a single jack.

Q. You understand hand drilling? A. Yes, sir.

Q. You have done a good deal of that?

A. Yes, I have done a good deal of that.

Q. And you consider yourself a good average man as a miner?

A. Well, where I have been working in the mine.

Q. Where you have worked, have you drawn as high wages as other men, as a miner?

A. Yes—where I have worked as a miner; yes.

Q. When you were working for Mr. Gray were you working as a miner or mucker? A. A miner.

A. And drawing miner's wages? A. Yes, sir.

(Testimony of John Pedrin.)

Q. When did you go to the Beatson Copper Co. mines?

A. I went early in the fall,—about this time of the year.

Q. Last year? A. Yes, sir. [23—8]

Q. About November 12th?

A. Yes, sir, about—something like that; I am not exact about the date.

Q. Who was superintendent of the mine at that time? A. Mr. Van Campen.

Q. Did you go to work at once when you went there?

A. No, I stayed there about a couple of weeks or more; I don't remember exactly.

Q. Then were you put at work?

A. Yes, they put me to work after a while, when I was there.

Q. What work did you do?

A. I went mucking.

Q. What wages were you paid there?

A. I was getting $2.50 and board.

Q. That was the regular wages for muckers?

A. Yes, sir.

Q. Why were you put to work as a mucker—did you ask for work as a mucker or miner?

A. As miners they only had two or three fellows to run the machine and they didn't have any work for a miner and I asked for a single jack.

Q. You went mucking because that was the best job they could give you?

A. Yes, that was the job they gave me.

(Testimony of John Pedrin.)

Q. Do you remember about what time this happened—this accident?

A. I don't know exactly what time it was—it was after one o'clock, anyhow.

Q. About what time in the month?

A. Well, it was in January,—I think about the last of the [24—9] month—I ain't sure.

Q. What month?

A. In January, after Christmas.

Q. January, last winter? A. Yes, sir.

Q. January, 1913? A. Yes, sir.

Q. How long had you been working steadily when this accident happened?

A. Steady I was working about two weeks.

Q. What were you doing during those two weeks?

A. Well, I was mucking and shoveling the snow—shoveling the cars and cleaning the track and bridge there.

Q. Where did you work as a mucker?

A. Well, I worked sometimes in that glory hole,—any place they put me to work.

Q. Describe the mine, the glory hole and the side-hill there as well as you can, so as to make the jury understand the place where you were working—some of them have seen it and others I expect have not—describe the glory hole and the surrounding hill, the works around there as well as you can.

A. There is a glory hole—there is a tunnel, a big bluff—it is a big bluff and then at the foot of that bluff about 25 or 30 ft. there is a shaft there they call 38, and they start that glory hole at the mouth

(Testimony of John Pedrin.)

of that shaft, and so we were working, keep on coming toward the blacksmith-shop, that is from the bluff.

Q. Now, are there two tunnels there about on the same level?

A. Well, it is a tunnel around there and there is a little smaller tunnel there—there are several little tunnels [25—10] there,—I don' know how long they are.

Q. This shaft, where is that with relation to one of the tunnels—does one of the tunnels run off to the south?

A. A tunnel runs like that from that shaft, there is a long tunnel there.

Q. Is this shaft close to the tunnel or in it?

A. It is about 50 feet from it, I guess—I don't know exactly how far it is.

Q. You say they started the glory hole right at the shaft? A. Yes, sir.

Q. Where does that shaft lead out to?

A. Leads to the level, to the lower level, so they get their ore on the cars below.

Q. That is, they drop ore through this shaft to the lower level?

A. Yes, sir, to get it out to the bunkers.

Q. How large is this glory hole?

A. It is probably about 6 feet wide—I am not sure, 5 or 6 feet—I am not sure how wide it is.

Q. Is there more than one glory hole there?

A. Well, the glory hole, when I was working there was only one that I know of.

Q. Now, you refer to the raise there?

(Testimony of John Pedrin.)

A. Which raise?

Q. Did you mean the shaft when you said it was only 6 feet wide—I mean the big hole?

A. The glory hole?

Q. Yes, how big was that?

A. That would probably be about 14 or 15 feet wide at the time and probably—they just start, you know, it wasn't very big—10 **[26—11]** or 12 feet deep.

Q. It was 14 or 15 feet wide and how long?

A. About 20 feet long; something like that.

Q. It was something like 15 by 20 feet?

A. Yes.

Q. And how deep?

A. Probably the side where the shaft was was probably 10 feet or 12 feet—I don't know exactly.

Q. You had worked in this hole before that night, had you?

A. I start seven o'clock to work that night.

Q. You had worked before that night?

A. Yes, I work there once in a while; not a great deal.

Q. You started at seven o'clock? A. Yes, sir.

Q. Working in the glory hole? A. Yes, sir.

Q. At the bottom of it?

A. Right at the bottom of it—we shovel right in the shaft.

Q. Was there anyone working with you?

A. Johnny Schmitt was working with me.

Q. Anybody else? A. No, sir.

Q. Was there anybody else working in any part

(Testimony of John Pedrin.)

of the glory hole?

A. The machine drill was working in the side there drilling a hole there, two men.

Q. They were up near the top?

A. Right at the edge of the glory hole, at the top.

Q. What were you doing between seven and eleven o'clock that night? [27—12]

A. We were breaking rock with a hammer and shoveling ore on to the shaft—mucking.

Q. That was your employment during all the time on the first half of the shift, from seven o'clock—what time did you quit work?

A. At twenty minutes after 11.

Q. What did you quit for? A. To go to dinner.

Q. These men that were drilling, were they still at work at that time?

A. No, they quit at the same time—they quit and went to dinner at the same time.

Q. Do you know whether they had put in the powder at that time?

A. They had the powder in—they had a load ready to shoot at the time.

Q. Was it ready at the time you went off to dinner, was it ready to fire? A. Yes, sir.

Q. What time did you return from dinner?

A. Twelve o'clock.

Q. Do you know whether or not they fired that shot in the glory hole while you were gone?

A. Yes, I know they were going to shoot.

Q. Do you know whether they did or not?

A. Well, I know they did shoot.

(Testimony of John Pedrin.)

Q. Did you hear it? A. Yes, sir.

Q. Who was the foreman or shift boss, whichever they call him?

A. Mr. Green was the shift foreman at night.

Q. On the shift starting at seven o'clock?

A. Yes, sir. [28—13]

Q. Were you working under his orders?

A. Yes, I was working under his orders.

Q. Now, after they fire off a shot in that glory hole what do they usually do first?

A. Well, they always give us orders what we have got to do, so that night he gave me orders to go and clear up that shaft and bulldoze that big rock that fell down.

Q. After they fire off a blast in the hole what is the first thing they do—do they do anything about the walls? A. Yes.

Q. What do they do?

A. They just take the loose stuff down, bar down.

Q. How do they do that?

A. They get bars and hammer and wedges, or if they don't, they get some powder, put it in the crack and fire it down.

Q. I understand they go around with bars or hammers and try to break down the loose rock that has been left hanging, that didn't break clear off.

A. Yes, they do that any place I work.

Q. When you came back, did anybody give you any orders? A. Yes, sir, Mr. Green gave me orders.

Q. What did he tell you to do?

A. He told me to go to that shaft 38, where there

(Testimony of John Pedrin.)

was a glory hole, and bulldoze all them big rocks that fell down, that had been shot in there.

Q. What part of the glory hole would that work be in?

A. It was out in the shaft, right in the shaft.

Q. Was it on the side of the glory hole or bottom?

A. Right in the bottom of the glory hole where I have to do that work. **[29—14]**

Q. Was anybody else put to work with you?

A. No, only Johnny Schmitt was with me. I start to bulldoze—he tell me as quick as I can because he want to get some ore out of there.

Q. Who told you that?

A. Mr. Green—he said as quick as I can because he wanted to get some ore and I start, but he didn't get through.

Q. What happened?

A. I start to put in my bulldoze—I had a can of powder, about six or seven sticks of powder and about thirty or forty primers and I was around there fixing my bulldozes.

Q. Who was with you?

A. Johnny Schmitt was holding the lantern for me.

Q. How much light was there in that glory hole?

A. We only had a lantern.

Q. Was it a dark night or light night?

A. It was dark,—not dark, just medium.

Q. Did you have any light except the lantern?

A. That is all I had, a lantern.

Q. A small hand lantern?

(Testimony of John Pedrin.)

A. Yes, a small hand lantern.

Q. You were bulldozing and Johnny Schmitt was holding the lantern? A. Yes, sir.

Q. Tell what happened.

A. Then I went around and I was pretty near ready to test my fuses—I had about twenty bulldozes all made out, all ready, so I went on my knees to fix up another bulldoze—

Q. Get down on the floor and show the position you were in.

A. I was in this position, like this (indicating), and so he was [30—15] standing like that (indicating), and I was fixing this up to test my shots and he hollered to me, but I had no time to get away.

Q. Who hollered to you?

A. Schmitt—and it hit me between the shoulders and I fell down and I know no more about it until quite awhile.

Q. When you became conscious where were you?

A. I was out of the glory hole.

Q. On the ground somewhere?

A. Yes, up on the ground.

Q. What did they do with you?

A. Well, they helped me up to the hospital.

Q. Where is the hospital?

A. Down toward the beach.

Q. How long were you in the hospital?

A. Well, I don't know exactly. I was there pretty near four months, something like that—I don't know exactly how long. I never took no attention to it.

Q. How long were you in bed in the hospital?

(Testimony of John Pedrin.)

A. Probably about two months.

Q. Now, just tell the jury what injuries you received—tell how you were hurt, every hurt you had.

A. I got a cut in here (indicating).

Q. How big was that cut on the face at the time?

A. They told me it was right to the bone.

Mr. BORYER.—I move to strike that as hearsay —that the answer be stricken and the jury instructed to disregard it.

Motion denied. Defendant allowed an exception.

The WITNESS.—I got this cut in here and I got another cut in here and the doctor told me if it was a little further down [31—16] here it would have killed me, would have touched my heart.

Q. Describe the cut a little more on your left breast.

A. It was right in here—it came just a little above—

Q. Tell what it was like, how deep it was and how big it was.

A. It was about that big (indicating) and it just went right to the bone, to the ribs, and I had this arm broke right in here—I got this muscle all smashed right down here, all smashed—I got no strength at all in this arm, and another thing, I had this rib here—

Q. Describe that.

A. Right in here, right below the chest here.

Q. How long was that cut and how deep?

A. This wasn't a cut; this was just this rib here was disconnected, so the doctor told me. I couldn't

(Testimony of John Pedrin.)

cough or couldn't sneeze or nothing; it pretty near killed me.

Q. Just describe to the jury how you were bandaged.

A. Well, I had that big bandage all around me for probably two months and a half,—something like that.

Q. What was that for?

A. To hold this rib,—it was bleeding—to hold it together.

Q. So it would knit? A. So it would knit.

Q. Were you in bed during all that time?

A. Well, I was in bed part of the time; yes.

Q. This injury to your left arm, about where is it? Describe that as well as you can.

A. Right in here (indicating) and so this muscle is all smashed down.

Q. Was the bone broken?

A. Yes, the bone was clear broke and this muscle all smashed, [32—17] so I never got that muscle back in position—it is all in a lump here in my elbow, so I can't do no hard work—I have got a pain like a rheumatism all the time, so that is all I get hurt from.

Q. You were in bed with your body strapped for about two months and a half as near, as you can remember?

A. I got up once in a while when I get a little better and go back to bed.

Q. You were in the hospital altogether about four months, you think?

(Testimony of John Pedrin.)

A. I think I was there about that long, more or less—I don't know how long exactly because I didn't take no attention to it.

Q. Did you suffer any pain? A. Yes, I did.

Q. Very much?

A. Sometimes I feel that I would be dead better.

Q. Was the pain constant or just now and then?

A. It was pretty hard pains, you know.

Q. From all of these injuries or from only part of them?

A. Yes, all these injuries—I suffered from this cut in here.

Q. Describe it in your own words—just describe how you suffered, as near as you can. The nature of the pain, whether they are shooting pains or anything of that kind.

A. I don't know; there was a pain—it was pretty hard; I don't know.

Q. Did it affect your breathing in any way?

A. Yes, sir, affected my breathing for quite a while.

Q. Does it now or have you recovered?

A. I have recovered, I guess. [33—18]

Q. But for quite a while, was it painful to breathe?

A. Yes, it pains and I couldn't breathe very good.

Q. For about how long?

A. That held me about two or three weeks like that—I couldn't hardly breathe or sneeze.

Q. For how long did you suffer pain from these injuries to your body?

(Testimony of John Pedrin.)

A. I suffered about—pretty near two months, pretty hard.

Q. After that time, after they took the bands or straps off of you, your body was pretty well healed?

A. Yes, sir.

Q. And you didn't suffer much pain after that?

A. I didn't suffer much pain after that, just a little.

Q. How about your arm?

A. My arm I had in a splint about two months—I suffered quite a bit in my arm.

Q. Have you ever ceased to suffer pain from your arm? A. Yes, I have.

Q. You don't understand my question—do you still suffer pain or not?

A. Yes, I suffer pain—my arm is like it was rheumatism pains.

Q. Does that continue up to the present?

A. Yes, it continues up to the present.

Q. Do you remember about what date you came out of the hospital?

A. No, I can't tell the day I came out of the hospital.

Q. About—if it was about four months that would bring it to the last of May—do you think it was about that time? A. I don't remember exactly.

Q. Was it summer when you came out of the hospital? [34—19] A. Yes, it was summer.

Q. Now, what did you do when you came out of the hospital?

A. I was around the camp there shoveling a little snow and doing a little light work around there.

(Testimony of John Pedrin.)

Q. Did they pay your wages after you came out of the hospital? A. Yes, sir.

Q. Do you remember when you commenced to draw wages?

A. I don't remember the month I started; I worked four days of the month—once when I started I was shoveling snow; I think it was in June.

Q. Where were you shoveling snow?

A. Along the track, from the camp to the wharf and they have a sidewalk there along the beach to go to the dining-room.

Q. What other work did you do besides shoveling snow?

A. Well, I was shoveling a little ore in the cars there, cleaning up the bunkers and mucking a little bit down there what there was to do.

Q. Did you work in the mine any? A. No.

Q. How long were you working there after you came out of the hospital?

A. I worked there nearly two months.

Q. Did you draw any wages while you were in the hospital? A. No, sir.

Q. Did you do any hard work down there, any heavy work, after you came out of the hospital?

A. No.

Q. To what extent could you use your left arm in the work you did?

A. I can't use it very much—I use it a little.

Q. In shoveling snow? [35—20]

A. In shoveling snow, things like that—I can

(Testimony of John Pedrin.)

shovel a little, at the same time I can't shovel very steady.

Q. Could you use your left arm in shoveling?

A. Not much.

Q. Do you have to do most of the work with your right arm? A. Yes, sir.

Q. Did it cause you any pain in your left arm where it was hurt to do that shoveling?

A. Yes, it does, when I shovel quite a while.

Q. Now, when did you quit there?

A. I forgot when I quit.

Q. You worked about two months you said?

A. Yes, something like that.

Q. And you probably quit around about the last of July or first of August?

A. Something like that.

Q. What did you do after you quit at Latouche?

A. I came here and have been doing little jobs I can do around here.

Q. You have been in Valdez since you quit there?

A. Yes, I have been in Valdez since I quit there.

Q. What have you been doing around here?

A. I have been working here for Mr. Shafer fixing up his house and once in a while any little job I get around any place.

Q. Have you done any hard work? A. No.

Q. Can you do hard work now?

A. No, I can't do very hard work.

Q. Do you have any trouble in doing work except with your left arm? [36—21]

(Testimony of John Pedrin.)

A. Yes, that is the only trouble I have got, with my left arm.

Q. Your left arm is all that pains you now?

A. Yes, sir.

Q. Your back is strong?

A. My back is strong, yes.

Q. There is nothing wrong with you now?

A. Excepting my arm.

Q. Who else did you work for around here?

A. I worked for Al White, worked in Blum's, out there putting tar on the roofing.

Q. Could you at this time work as a miner, a single jack? A. I can't work now any.

Q. Why can't you?

A. Because I can't hold the drills. I couldn't hold the drill to hit it—I can't stand it the way it is.

Q. What is the highest wages you ever drew in Alaska as a miner? A. $3.50.

Q. Where was that?

A. Over on the Iverson property.

Mr. RITCHIE.—That's all.

Cross-examination.

(By Mr. BORYER.)

Q. What wages were you drawing when you were working for the Beatson Copper Company?

A. $2.50 and board; that would be $3.50.

Q. Two dollars and a half and board?

A. Yes.

Q. When did you start working there, do you recall?

A. No, sir, I don't recall when I started to work

(Testimony of John Pedrin.)

there—I [37—22] never took no pains about the time at all.

Q. You went down to Latouche some time in November? A. Something like that.

Q. 1912? A. Yes.

Q. Do you know what part of November?

A. No, sir, I don't know.

Q. Was it the early part or latter part of November?

A. Well, I think it was about the middle of November, something like that—I am not very sure what time.

Q. Where did you go from?

A. I went from Cordova.

Q. How long had you been in Cordova?

A. I was there a couple of weeks at that time.

Q. You were in Cordova then about two weeks?

A. Yes, sir.

Q. Before you went down there? A. Yes, sir.

Q. What were you doing in those two weeks?

A. I came up from the line and I was stopping there waiting for a boat to go out, anywhere, and the first boat that came in I came up to Latouche.

Q. You stayed there two weeks waiting for a boat?

A. Yes, sir.

Q. And you took the first boat out? A. Yes, sir.

Q. How long after you had gotten to Latouche was it bebore you went to work?

A. Well, I stayed around there, I guess, a couple of weeks. I don't know exactly how long it is—I didn't get a job right [38—23] away there, and

(Testimony of John Pedrin.)

I stayed at that place that Johnny Wild has there for a time—I don't know exactly how many days I stay out of work. I stay quite a few days.

Q. Did you start to work before Christmas?

A. Yes, I worked before Christmas.

Q. How long before Christmas?

A. Probably it was about a month I guess. I don't know exactly—I don't know how long.

Q. You were in Latouche about a week before you began work; is that right?

A. No, I can't tell exactly,—I think it was over a week.

Q. About two months?

A. Yes, something like that,—I don't know exactly how many days.

Q. About two months, you think?

A. Yes, sir, about something like that.

Q. What were you doing those two weeks?

A. I was doing nothing—I had nothing else to do there but waiting for a job.

Q. Where were you staying?

A. Staying in Johnny Wild's place.

Q. Whose place is that?

A. Johnny Wild is a man has a saloon there and rooming-house and was running kind of a little hotel and I was stopping with him.

Q. Did you apply for a job when you went there?

A. Yes, sir, the first thing.

Q. What kind of a job did you apply for?

A. I asked for anything they could give me.

Q. Did you tell them you were a miner? [39—24]

(Testimony of John Pedrin.)

A. I told them I was a good single jack and hammer-man, that is all.

Q. You allege in you complaint that you are a miner, a competent miner, capable of earning the highest going wages; is that correct?

A. Well, I am a miner. I said I was no machine-man and all that, but I say I am a miner in this way—I am a hand miner with a single jack or double jack, anything like that. I can drive a tunnel; I can work in any of the mines.

Q. You are familiar with the general work around mines? A. Yes, sir.

Q. And you have done all that kind of work?

A. Yes, sir.

Q. Where?

A. In California and here, when I get a show. Here in Alaska it is all the same wages—$3.50. A mucker gets just the same as a miner where I have been working.

Q. You have done such mining work as bulldozing?

A. Yes, sir.

Q. And mucking? A. Yes, sir.

Q. And barring down walls?

A. Yes, I have done all that kind of work.

Q. And you are generally familiar with mining work? A. Yes, sir.

Q. Work that is conducted around a mine?

A. Yes, sir.

Q. Did you tell them that when you went there and applied for a job?

A. I applied for a job—I didn't tell them I was a

(Testimony of John Pedrin.)

miner when I [40—25] start; I say I will go to work and I will get a miner's job when I am acquainted with the job, and I asked him just for a job and he refused me a job and told me maybe after a while, to wait; there was four fellows, we were together, and he put the other three fellows to work except me.

Q. And then you began to work there about two weeks after you had arrived at Latouche?

A. Something like that.

Q. Which would be somewhere around the first of December, 1912? A. Yes, sir.

Q. What work did you start to do there?

A. Mucking, wheeling ore around to the shaft.

Q. What do you mean by mucking?

A. Priming rock, shoveling ore in the wheelbarrow and throwing it in there.

Q. To be taken over to the bunkers, from the level down to the bunkers? A. Yes, sir.

Q. This ore was shot down, was it?

A. They put in a shot once in a while—there is a big bluff and they put a shot there and we had to muck there sometimes two weeks before we got through with it, probably more.

Q. Then you put a shot in and the ore and dirt would fall down? A. Yes, sir.

Q. And after it would fall down, you as one of the muckers would shovel this ore into the car or into the shaft? A. Yes, sir.

Q. Which would be taken from there to the bunkers? A. Yes.

(Testimony of John Pedrin.)

Q. And from there it would be shipped to the mills, is that correct? [41—26] A. Yes, sir.

Q. What part of the mine did you start to work in when you began your work? A. When I start?

Q. Yes.

A. I was way down in California.

Q. I mean when you started working for the defendant corporation, the Beatson Copper Company.

A. Right in the bluff.

Q. About the same place where you were hurt?

A. No, not exactly.

Q. I mean it was around that same hole?

A. Yes, around the same place there, right in the bluff.

Q. How long did you work in that glory hole?

A. We never work steady; some time they come and put me another place and sometimes they put me there—we never had a man steady except the machine-men.

Q. Where else would you work?

A. All over the bluff where they put me; sometimes they put me shoveling snow down there; sometimes we were wheeling ore in the cars, doing any work—shoveling.

Q. What other kind of work were you doing?

A. That is all the work I do there the time before I was hurt just mucking—

Q. And shoveling snow? A. Yes.

Q. And breaking down ore?

A. Yes, breaking rock, big chuncks of ore—we

(Testimony of John Pedrin.)
would break up the rock so they don't block up the chute.

Q. Then all of your work from the time you began there to the [42—27] time you were injured was in and around this particular glory hole in which you were injured, was it not?

A. There was a lot of snow around there.

Q. Let me see if I have a correct impression there. As I understand it, there is a large glory hole there, is there not? We will call it a pit instead of a glory hole.

A. They give it the name the glory hole at the time they start it.

Q. Is there not a big pit there, about 300 feet wide and 50 to 80 feet long, a big pit?

A. Yes, alongside of the glory hole.

Q. Now, then, in this pit there is a glory hole?

A. The wall of the glory hole came to that pit and to that shaft.

By the COURT.—Ask the witness if he knows what is meant by glory hole.

(By Mr. RITCHIE.)

Q. You know what a glory hole is?

A. I understand a glory hole is just a hole—

Q. Had you ever seen them in other mines?

A. No, I never work before in a glory hole.

Q. You never worked in the Treadwell?

A. No.

By the COURT.—Isn't a glory hole supposed to be a big open cut or quarry as distinguished from a shaft or tunnel or vein—isn't a glory hole supposed

(Testimony of John Pedrin.)

to be a large pit or quarry in the rock and is blown down from the sides like the glory hole at Douglass?

Mr. RITCHIE.—Yes, that is my understanding. I suppose it will be more fully explained by Mr. Van Campen after a while. [43—28]

By Mr. BORYER.—At the time you were injured you were working down in the hole?

A. Yes, I was working in the hole.

Q. About what was the size of that hole?

A. The hole I was working in—I can't tell how big it was.

Q. Wasn't it at that time about 40 feet long and 25 to 30 feet wide? A. At that time?

Q. Yes. A. I don't know.

Q. Approximately what was its size at the top?

A. I never took no attention to that, because I was just working—I never know how wide it was or how long.

Q. You know what 40 feet is, don't you?

A. Yes, sir.

Q. Would you say that it was about 40 feet wide or long?

A. Well, I can't tell, because I never took no judgment about it—I never took no attention to how long it was or how wide it was or how deep. All I know that thing sloughed on top of me ten or twelve feet deep.

Q. It was about ten or twelve feet deep?

A. Yes, sir, where the stuff fell, where I was.

Q. You didn't see the stuff fall?

A. No, I didn't see it.

(Testimony of John Pedrin.)

Q. You say you worked up at Gray's mine—how long did you work up there?

A. I worked about a month and a half in that place

Q. What were you doing up there?

A. Well, I was driving a tunnel for a while and then we start to make a trail, to fix up the trail, so we could haul stuff up—they were putting a tramway there at the time and [44—29] we were making a trail to the bottom of the glacier.

Q. Who was helping you to drive this tunnel at Gray's?

A. There was several fellows—there was two of us driving at a time. There was three of us, my partner's name was Murphy.

Q. And what work did you do?

A. Drilling—we were drilling there.

Q. Would you help load the holes?

A. Yes, I do several times, and load them myself.

Q. And then you helped to shoot them?

A. Yes, one time he come up and I touch the fuse—one stay down and shoot it and the other come up—there was a kind of raise and then there was a tunnel there and we were driving another crosscut.

Q. Now, then, after you quit that tunnel work there, you went to work for Iverson, did you?

A. No, I worked before for Iverson, before I went up there.

Q. What were you doing for Iverson?

A. We were driving a tunnel.

Q. Who was helping you there?

(Testimony of John Pedrin.)

A. A fellow named—I don't remember his name right now.

Q. Just one man?

A. Well, we were two driving and one mucking the stuff out.

Q. Who was doing the driving?

A. I and the man that I don't remember his name now, a Swede fellow.

Q. You two would do the drilling and the loading and the firing of the shots? A. Yes.

Q. How long did you work there? **[45—30]**

A. I worked there about a month and a half or two months, something like that.

Q. In driving that tunnel? A. Yes, sir.

Q. Then you had driven tunnels at Gray's and at Iverson's, had you?

A. Yes, sir; I didn't work very long at Gray's on the tunnel. I probably worked two shifts in that tunnel and then I went to make that trail—stopped the mining work and went to work to get the trail ready for the winter, so they could haul the stuff on the sleighs.

Q. Now, in your direct examination you said you were getting three dollars and something and board—as a matter of fact, you were only getting two dollars and something and board?

A. I never got more than $3.50 and pay board out of it.

Q. That is, you paid your board out of it?

A. Yes, that leaves me $2.50.

Q. How long had you been working in this partic-

(Testimony of John Pedrin.)

ular pit, the glory hole as you call it, before this time that you got injured?

A. That night I went to work in there; sometimes I work every shift a couple of hours and then they get me out to shovel snow and go some place—I never stay there except that night—I stayed from seven o'clock to the time I got hurt.

Q. You had been working in that particular pit or glory hole some time, had you?

A. Several days—I go to work there when they put me to work there; yes, sir.

Q. You had worked in there off and on, had you, from the time you began working for the Beatson Copper Co.? **[46—31]**

A. No, because I start that way after I go to work —they had a fellow drilling there when I was mucking the bluff—they had two fellows drilling there by hand.

Q. But you were working in and around there?

A. I was working around that.

Q. All the time—ever since you have been working in the mine?

A. Until I got hurt, around there; yes.

Q. Where were you working the night before you got hurt? A. I was working right in the pit there.

Q. Right in that same pit?

A. Yes, right in that same pit.

Q. Did you work a full night's shift?

A. We worked from seven o'clock until 11:20 and we go to dinner and come back 12 o'clock and are supposed to quit four o'clock in the morning.

(Testimony of John Pedrin.)

Q. That is what you call a full shift?

A. That is what we call a full shift there; yes.

Q. You were working the night shift, were you?

A. At the time I was hurt? Yes.

Q. The night before you got hurt, were you working the night shift?

A. Yes, I was working night shift.

Q. In that same place, the same pit?

A. Yes, sir.

Q. The night before that where were you working?

A. I was working around the pit and bluff.

Q. The same place?

A. The same place—I worked there two weeks.

Q. And you worked a full night shift?

A. Yes, sir. [47—32]

Q. And the night before that—four nights before you got hurt—were you working in the same place?

A. I can't say in the very same place—I was working there.

Q. But you were working in that same pit or glory hole?

A. Maybe I wasn't in the glory hole—around the bluff, or any place they send me; sometimes they send me around the mine to do something.

Q. Four nights before that do you know where you were working?

A. I can't tell where I was working. I was working there for the same foreman, anyhow.

Q. Do you know where you were working?

A. I was working around the bluff somewhere.

Q. Were you working in that place?

(Testimony of John Pedrin.)

A. Yes, I was working in that place; yes, sir.

Q. And how long had you been working in that place, about how long? A. Night shift?

Q. Yes.

A. That was my last night shift—that was Saturday night; I was working two weeks in January.

Q. Then had you been working there about two weeks in that same place?

A. Yes, sir, about the same place, around the bluff there and the mine.

Q. Had you worked for about two weeks in that same pit or glory hole?

A. Well, not exactly—sometimes they send me to the blacksmith-shop to do some work, or to shovel or clean the track or something—send me to go and do something in the mine and I would go back and go to work shoveling snow or ore or [48—33] muck or whatever it was.

Q. But your general work was right in that pit or glory hole? A. Yes, sir.

Q. Now, that is correct, is it—except when they would send you out to get some tools sharpened to the blacksmith-shop or something? A. Yes.

Q. What kind of work did you begin to do when you began working in that pit or glory hole—the place where you were injured?

A. When I start to work the first time?

Q. Yes.

A. I start to break ore with a hammer and shovel down the holes or shaft.

Q. How is that?

(Testimony of John Pedrin.)

A. Breaking down with a sledge-hammer and shoveling it to the shaft and dump it—that's all.

Q. And that was the ore and dirt that had been shot down, was it?

A. Yes, we shot it down; yes, sir.

Q. You were familiar with and knew the conditions around there in this pit, did you?

A. Well, I know the condition, yes; when we were working there.

Q. And you could see the conditions there all the time, could you?

Mr. RITCHIE.—That is not a fair question—the evidence already discloses that the conditions must have been changing from time to time. We object to it.

Objection overruled. Plaintiff allowed an exception.

Q. You were around there for two weeks doing general work, were you not, in this pit? [49—34]

A. Yes, I was working around.

Q. And could see what you were doing?

A. Not exactly; you couldn't see what you were doing because there was a lot of snow and ice around there.

Q. You could see the snow and ice and could see the conditions, could you not?

A. You could see the ice and snow, yes—you could see that.

Q. And you knew the conditions around there during those two weeks?

A. No, they were shooting there and working there

(Testimony of John Pedrin.)

all the time. That is all; I only was a mucker.

Q. Now, then, who fired this shot just when you quit work *to dinner* this time?

A. A fellow they call Conine.

Mr. RITCHIE.—Do you know yourself—did you see him fire it? A. No, I didn't see it fired.

Q. Where were you when he fired?

A. We went to dinner—a little house they had there for the lunch; they had a little building built there so we could go to dinner there.

Q. He went to dinner with you?

A. He didn't go with me; he went right after, some time after he got through; he went to eat there, up there in the same place.

Q. You saw him drilling the hole?

A. I saw him working there, working the machine there; yes.

Q. You say he fired the shot there—did he tell you he was going to fire the shot?

A. No, he never told me anything.

Q. Did you hear the shot fired? **[50—35]**

A. There was quite a few shots shot there, because I *had quite* a few myself.

Q. But after you quit work to go to lunch, did you hear him fire the shots? A. Fired several shots.

Q. You heard him fire several shots? A. Yes.

Q. And you knew they were fired in there?

A. Yes, I knew they were shooting; yes, sir.

Q. Who went to dinner with you?

A. The whole bunch that was working there.

Q. Everybody that was working in that pit?

(Testimony of John Pedrin.)

A. Yes, sir.

Q. How did you go? A. We walked up there.

Q. Did the powder-man go to dinner with you?

A. Well, we all went to dinner—there was no powder-man there at night-time; he makes the hole—the same machine-man loads his hole and fires it.

Q. The fellow who fired this shot, did he go to dinner with you?

A. Well, he didn't went right away with me—I went ahead.

Q. How far ahead were you?

A. I can't tell you, because we were all eating there; one was working a little away, a little distance further along, but we all go—I can't tell you how long.

Q. When you went back after dinner, who went with you?

A. We all went back, the whole bunch, and then Mr. Green gave us the orders what we are to do.

Q. How many were there of you? [51—36]

A. I don't know how many there were. I never counted them.

Q. Did Mr. Green go clear back with you, back to this pit?

A. Yes, he stand right at the edge of the glory hole.

Q. Standing on the edge of the glory hole?

A. Yes, sir.

Q. And what had you been doing just before dinner?

(Testimony of John Pedrin.)

A. We were breaking rock and shoveling down to that 38 place.

Q. What did you do directly after you came back from dinner, what was your first work? The same kind of work, was it?

A. He came and told me to get at that bulldozing as quick as I could, because he wanted the ore. "Johnny," he said, "I want you to go as quick as you can and get those big boulders cut down."

Q. What had you been doing just before dinner—had you been bulldozing?

A. Yes, I bulldoze before we went to dinner. I bulldoze some little rocks there.

Q. And you continued your bulldozing as soon as you came back?

A. Yes, he gave me orders and I went after the powder right away after dinner.

Q. You went to dinner—this shift boss didn't tell you to stop bulldozing, did he, when you returned?

A. No, sir, he didn't tell me to stop.

Q. And that was the work he had set you to do in the morning? A. Yes, sir.

Q. And when you came back after dinner, you went and continued this same work you were doing in the morning, did you not?

A. I was bulldozing, yes, when I got hurt.

Q. Now, you were injured on the 25th of January, were you not, instead of some time in February, as you allege in your complaint? [52—37]

A. Well, I can't tell what date it was, because I don't remember exactly.

(Testimony of John Pedrin.)

Q. Now, you quit work on the 26th—the time sheet shows the time you quit work, January 26th. I presume that is the time you were injured.

A. It might be that day; I can't tell; I don't remember.

Q. You don't know whether that is correct or not?

Mr. RITCHIE.—I don't dispute your record—it is undoubtedly correct.

Q. Now, you remained in the hospital, then, during the month of February, did you not?

A. Yes, I was in the hospital.

Q. All during the month of February?

A. Yes, sir.

Q. And four or five days during January?

A. I was in the hospital—I don't know how long.

Q. Now, then, didn't you begin work again on the 25th day of March?

A. That might be—I did a little work, I don't know exactly whether it was the 25th of March. I just started to do a little work around there; I don't know exactly what month it was. I never took no attention to it.

Q. I hand you defendant's pay-roll for the month of March, 1913, and ask you if you did not draw a check for work that month so that you were entitled to $12.85. I ask you if that is not your signature.

A. That is my name.

Q. That is your signature?

A. That is my name, yes.

Q. Did you write that? [53—38] A. I did.

Q. You did write that? A. Yes.

(Testimony of John Pedrin.)

Q. Then you must have gotten a check for that amount for March, did you not?

A. The first money I got when I started to work was $4.00 and some odd cents in cash.

Q. But you had worked and earned $12.85, had you not?

A. At that time I was still in the hospital and I just went out and shoveled a little snow around by the track.

Q. Then you did work during the month of March?

A. Yes, if it is there I did.

Q. And you admit that is you signature there and you signed that?

A. Yes, I signed it, yes, sir.

Mr. BORYER.—These are the pay-rolls of the company, that they use in keeping their accounts, and I would like to ask permission to show this to the jury and if counsel hasn't any objections, to withdraw it.

By the COURT.—You had better submit it to Mr. Ritchie.

Mr. RITCHIE.—I am perfectly willing to admit that if plaintiff's signature is on this pay-roll that he received pay to the amount which his signature indicates for that month. I don't admit he did any work to get that; it might have been a gift to him, but I admit he received that under the name of wages.

By the COURT.—Read into the record then the dates and amount.

Mr. BORYER.—(Reading.) Name, John Pedrin; occupation, mucker; three days and six hours;

(Testimony of John Pedrin.)

rate $3.50 per day; amount, $12.85; store deduction, $3.85; board, $4.00; hospital, 40 cts.; total [54—39] deduction, $8.25; balance due, $4.60; cash, $4.60; signed under signature John Pedrin. Month of March, 1913. This is the pay-roll of the company for the month of March, 1913.

Mr. RITCHIE.—The plaintiff admits that the pay-roll of the defendant corporation for the month of March, 1913, shows the charges and credits for and against John Pedrin, the plaintiff, as read by Mr. Boryer into the record.

Q. I show you pay-roll of the defendant corporation for the month of April, 1913, and ask you if you did not do work during that month for which you earned $63.40, and I will ask you if that is not your signature, on the same line across from that amount? A. Yes, sir, that is my name there.

Q. And you signed it, did you?

A. Yes, sir, I did.

Q. And you received and did work during the month of April, 1913, to the extent of $63.40; is that correct? A. All I received was $19.30.

Q. But you did work which entitled you—

A. Yes, that is the time they gave me; I was monkeying around shoveling a little snow from the track with one hand.

Mr. RITCHIE.—We object to Mr. Boryer stating to the witness that he actually received that; we will admit what the record shows and I don't think there is any doubt about the fact, but I don't want the plaintiff to be forced to admit it.

(Testimony of John Pedrin.)

Mr. BORYER.—You admit the amounts and distribution on the pay-roll is correct; as it appears there?

Mr. RITCHIE.—No, but I admit that the pay-roll for the company for that month shows as you have read it or will read it and that he, the plaintiff, admits that is his signature in [55—40] the usual place on the pay-roll and let the pay-roll go for what it is worth.

Q. I see from this pay-roll, designating you as doing mucking work, in which you worked eighteen days and one hour; for which you were to receive $3.50 a day, and that the total amount of that was $63.40, from which there was a store deduction of $22.10, board $20, hospital $2; total deduction, $44.10—balance due, $19. 30; is that correct?

Mr. RITCHIE.—We object to the question unless the plaintiff personally remembers this. I shouldn't think this was necessary. I have no doubt they can prove those payments were made by Mr. Van Campen and we will not dispute it—I don't want the plaintiff, however, forced to make admissions as to a matter of charges and credits there which he doesn't remember.

By the COURT.—The objection will be overruled; the witness can state whether he remembers or not and if he doesn't remember he can so state.

(Plaintiff allowed an exception to the ruling.)

Q. As a matter of fact, you did work during the month of April, 1913, 18 days and one hour—did you or did you not?

(Testimony of John Pedrin.)

A. I don't know. I was working there, monkeying with one hand and whatever they gave me, I took it. Sometimes I worked a couple of hours and knocked off and sometimes I worked half a day around there with a shovel, shoveling snow, and would go to the bunk, I couldn't stand it, and Mr. Van Campen told me if I couldn't stand it to lay off. I never took track of my time. I took what they told me is right.

Q. Then you don't know if you worked 18 days and one hour or not, do you?

A. No, sir, I don't know if I did, because they just gave me the [56—41] time—I guess it was right, when I was monkeying around with one hand.

Q. And you may have worked 18 days and one hour, may you not—it is possible you did do it, is it not?

A. I didn't do much work; it was with one hand, shoveling the snow. Sometimes I worked a couple of hours and sometimes one and sometimes five and knocked off, and I never took track of the time I worked—the time they gave me I took.

Q. I will ask you this question: I believe you stated on your direct examination that you were confined in the hospital for four months and didn't do any work during those four months. Now, I will ask you if that is correct or not.

A. I was walking around and doing a little work—for four months, I say, I don't remember just how long I stay in the hospital—he ask me and I say three months, more or less.

Q. Then you didn't want the jury to believe that

(Testimony of John Pedrin.)
you were in the hospital four months?

A. What I said—I said I didn't know exactly how long I stay in the hospital, and that is the truth. I said that before.

Q. Now, then, I show you defendant's pay-roll for the month of May, 1913, and ask you if you didn't do work and draw a check and was entitled to the amount of $100.35? That is your signature, is it not? A. That is my name there.

Q. Did you sign it? A. I did.

Q. Now, then, this pay-roll shows you as laboring under the head of a mucker for 28 days and 6 hours at $3.50 a day, the total of which amounted to $100.35. Now I will ask you if that is correct? [57—42]

A. It might be correct.

Q. You signed for that as being correct, did you not—that is your signature, I believe—you admit that? A. Yes, sir.

Q. Now, I will ask you what you were doing during the month of May.

A. I do so many things I can't tell you exactly what I was doing—I was doing anything that came along.

Q. Was that light work also?

A. Well, I went down to the assay office and helped the engineer down there for a while, to do any little things that came along there, untie the cars, etc.—I didn't know anything about that work, but they put me in there and I worked there a while; it was light work.

(Testimony of John Pedrin.)

Q. Tell the jury what work you did there in the assay office.

A. I was just grinding the ore, taking the samples for the engineer and helping him—anything he told me to do, helping him assay, something like that. I don't know what part of the month it was or what day it was when I started there.

Q. That was when you were doing your work?

A. Yes, I always do light work there when I was working there and I have been doing light work since because I can't work hard,—would go to the ore bins and get samples.

Q. You would go to the ore bins and get samples?

A. Yes.

Q. You would get those samples in sacks, would you?

A. Yes, small little sacks; sometimes I take little pieces of rock and put it in the sacks and take it to the assay office and put it through the machine—all I had to do was to start the machine and put the ore through. [58—43]

Q. How large were the sacks?

A. They weren't full,—a little sample from each car; they sometimes take a little piece of rock and throw it in the box from each car as they come from the shift. Take little samples and they put them in a box and I take them in a little sack, ore sacks, put them in there and take them to the assay office.

Q. Is that what you were doing during the month of May?

A. I don't know exactly whether I was there in the

(Testimony of John Pedrin.)

month of May or not—I went to work there,—I was working outside in the camp cleaning up and one day Mr. Van Campen told me to go and help the engineer do that and I don't know which day it was, or which month it was, but I went.

Q. Did you do any heavy work before you left there? A. No, sir.

Q. Didn't do any? A. No.

Q. All of it was light work?

A. Yes, all of it was light work that I could do.

Q. Do you remember during that month, during the month of May, that you were helping load from the dock over fifty tons of coal, put it in cars and pushed those cars to the place where the coal was stored, and during that time your cars would get off the track and you would help to lift those cars on the track?

A. Yes, I do, with one hand—I didn't do anything with my broken arm, I just helped; there were two men on the car and I pushed all I could with my one arm.

Q. Are you right-handed naturally or left-handed?

A. I am right-handed, so I can do a lot of work with my right [59—44] hand, but I can't do anything with my left hand.

Q. Then you did help to load those fifty tons of coal, put it into the cars and helped to take it to the storage point and there discharge it?

A. Well, yes, I helped the man all I could with one hand.

Q. You and another man did the work?

A. Yes, sir.

(Testimony of John Pedrin.)

Q. Who was that other man?

A. It was a man they called Griff.

Q. As a matter of fact, didn't you use both hands in that work?

A. Well, I used what I could to steady, get hold of it with a shovel. I said I could shovel a little with my hand and I did—I said that from the start, I could handle it, but after that I suffer. You know a man who is broke has to get along the best he can like I have been doing around here in Valdez, doing a little work. I do the best I can to live because I don't want to go begging to anybody—I don't want them to think I am begging.

Q. Then you worked all that month?

A. I worked there some time,—I don't know whether it was a month or not.

Q. And didn't you also work about six days during that month loading ore?

A. Taking a sample from the car when they came and touching the switch with one foot, changing the switch—that is all I did loading ore.

Q. Didn't you also assist in handling the freight from the boats during that month?

A. Yes, sir, I handled the lightest stuff I could handle, because they told me a light box I could handle with one arm [59½—45] like that (indicating)—I do the best I could with my hand.

Q. Now, then, I show you defendant's pay-roll for the month of June, 1913, and ask you if that is your signature and you signed it.

A. That is my name; yes.

(Testimony of John Pedrin.)

Q. You signed it?

A. Yes—for the month of June.

Q. On which pay-roll you are designated as a laborer and worked thirty days and five hours, for which you were entitled to $107.20 at the rate of $3.50 per day—is that correct? A. It might be correct.

Q. You don't dispute it, do you?

A. No, not for the month of June—it is all right for the month of June.

Q. Now, then, during that month what kind of work were you doing?

A. In June, that is the time I remember I was working in the assay office with that fellow.

Q. You were also handling freight, were you not?

A. Once in a while I would go and give a hand when Mr. Van Campen told me what I could do.

Q. And you were also working on the wharf, were you not?

A. Once in a while shoveling the snow or shoveling a little coal or cleaning up a little bit, or cleaning up the ore that fell in the tracks there.

Q. I show you defendant's pay-roll for thhe month of July, 1913 and ask you if that is your signature?

A. Yes, that is my signature.

Q. And you signed that? A. Yes, sir.

Q. And that was for wages due you for the month of July under **[60—46]** the designation of laborer, was it not? A. Yes, I was working there.

Q. In which month you worked thirty days and one hour and were entitled to $3.50 per day, the total of which is $105.45—is that correct?

(Testimony of John Pedrin.)

A. Yes, sir.

Q. Now, then, what were you doing during that month?

A. I was working in the assay office.

Q. You were working in the assay office then?

A. Yes, sir.

Q. Didn't you assist in the general loading of ore during that month?

A. When I go to the wharf I just go and tend switch when they are running the cars, that is all I do, and take samples.

Q. Now, you left there the first day of August, did you not?

A. I don't know whether it was the first day of August or not—I quit some time like that, but I don't know exactly what time I left.

Q. You worked one day in August, did you not, eight hours? A. Something like that.

Q. Then where did you go?

A. I came to Valdez—there wasn't any boat. I waited for the boat to come and when the boat came, I came up here.

Q. You stated here this morning in your direct examination that you had worked a short time for Mr. Al. White and Mr. Blum and Mr. Shafer?

A. Yes, sir.

Q. Is that the work you have been doing since you have been here?

A. I have been around and doing what little work I can; sometimes [61—47] I work for the doctor that is dead now—I work for him sometimes a couple

(Testimony of John Pedrin.)

of hours, and doing what I could.

Q. Just doing light work?

A. Light work, sometimes—I have been doing a little, what I can do with my hand. When a man goes to work he has to do what he can, if he don't, he don't get anything. If I had any money or anything to stay on, I won't work until this arm of mine gets a little better.

Q. What kind of work did you do for Mr. White?

A. I was working for a plumber, helping the plumber, with a pipe and sink, just holding the candle once in a while for him, etc.

Q. What else?

A. That is all I do for him, and I go around there and set pins once in a while there and make a couple of dollars once in a while.

Q. Set pins in the bowling-alley?

A. Yes, hold the pins with one hand and put them up there.

Q. How long were you doing that?

A. Any time I get a show.

Q. What kind of work were you doing for Mr. Blum?

A. When I work for Mr. Blum we were putting tar on the roof.

Q. Tarring the roof?

A. Yes—I was helping, holding the paper and throwing gravel on it.

Q. What kind of work did you do for Mr. Shafer?

A. I chopped a little wood and do a little around that house; he was moving and cut a little kindling

(Testimony of John Pedrin.)

wood once in a while.

Q. What kind of wood were you chopping? [62—48]

A. Inch boards, sawing with a saw there, inch boards and little blocks and old boards there piled up.

Q. Did you ever do any work down at the dock?

A. Yes, I have been doing a little work there once.

Q. What kind of work were you doing down there?

A. Well, once I was just tipping that bucket there—taking the rope off and let it dump.

Q. You mean the bucket on the ship?

A. Yes, I have been once or twice there—I can't stand that work. I could work there all the day but I couldn't stand it,—I had to lay off once two days with my arm.

Q. Did you ever do any handling of coal down there?

A. We were sacking coal once there; that is all I did there.

Q. Weren't you piling coal also? A. No, sir.

Q. You were not? A. Piling coal?

Q. Yes.

A. No, sir—the only thing I was doing there was helping the fellow lower the car—I get hold and load the truck—I was helping load their trucks.

Q. Load them with what?

A. Load them with anything that came from aboard the ship, freight or anything—get hold of it with my hand, what I could.

Q. Didn't you ever work on longshoring work down

(Testimony of John Pedrin.)

there, in which you were piling sacks of coal in the warehouse?

A. I was trucking—I wasn't piling no coal in the warehouse.

Q. You didn't pile any coal in the warehouse?

A. No, I was trucking coal from one warehouse to the other. **[63—49]**

Q. Did you ever assist in sacking coal down at the warehouse? A. Yes, I was sacking coal.

Q. Now, do you mean to tell me that you never did any work down at the warehouse in which you were piling sacks of coal in the warehouse?

A. No, sir, we were not piling coal in the warehouse—I was trucking; there was four fellows working, one was loading and two were piling the coal—I was with the truck.

Q. You were just using one truck, were you?

A. No, I think three trucks.

Q. Which trucks did you have?

A. I had one of the trucks with two wheels.

Q. And where were you wheeling this coal from?

A. From one warehouse to the other.

Q. Would you load your own sacks?

A. No, there was a man there loading.

Q. And you would truck it over? A. Yes, sir.

Q. Did you ever work for Mr. Deiringer?

A. I don't know him—I might have worked for him but I don't know his name.

Q. Did you ever do any work in the town here, taking piling, 6 by 8 by 10 feet long off the scow?

A. Yes, I was helping with that, yes, sir; of

(Testimony of John Pedrin.)

course that is light lumber, and I could hold with one hand and steady it with one and get hold of it—I am strong in my right hand and can lift pretty good; I must do the best I can—you know I don't want to go hungry and I don't want to go begging.

Q. You consider a tie 6 by 8 inches by 10 feet long is something [64—50] light do you?

A. I can lift it up by one hand pretty good.

Q. Do you know the weight of those ties?

A. No, I can't tell you the weight of them because one is lighter than the other.

Q. Have you any idea? A. No.

Q. That was the approximate length of those ties, was it not?

A. I don't know how long ties they were; we didn't have to lift them; two men throw them on top and I get hold of one end and we walk right along with it, with my hand—that is all we had to do and we took them a little ways; they are piled up on the wharf. The scow is alongside here and two men throw up, throw it up, from the scow—some of them were 20 feet long, some of them, and I pick it up with one hand and take it and walk away—one in each hand two men.

Q. Did you ever do any work on the Sampson?

A. Yes, I did.

Q. What kind of work did you do there?

A. I was in the holds, shoveling a little coal once—I worked once there with coal and once hooking the net and lowering a little when it was throwing freight on the wharf.

(Testimony of John Pedrin.)

Q. Did you ever work on the Sampson? Did you help discharge freights from the Sampson here and then go from here to Ft. Liscum and help discharge coal there? A. Yes, I did.

Q. And then go on down to the mine and discharge there?

A. We went from this wharf,—we went down to the Cliff and from the Cliff to Fort Liscum and then we came up here.

Q. What were you doing? **[65—51]**

A. They had sold the coal and I was shoveling coal,—that is the time I had to lay off two days; I thought I could do it but I went over my limit and I had to lay off two days—I couldn't hardly move my arm.

Q. You worked about fifteen hours?

A. I didn't work there long; they gave us straight time, from when we left here, when we started.

Q. How many tons did you unload at the Cliff mine?

A. I don't know, I can't tell—I didn't inquire how many tons.

Q. How long were you working at the Cliff mine?

A. I don't know how long it was; we stayed quite a while; I couldn't say exactly the time when we got up there and when we started and when we finished.

Q. How long were you working over at Liscum?

A. Well, we stayed there, I don't know how long we stayed there—I can't tell you how long we stayed there.

(Testimony of John Pedrin.)

Q. What were you unloading there?

A. We unloaded some coal.

Q. Have you any idea how much? A. No.

Q. How many of you were working there?

A. There was a bunch—the sailor crew and some longshoremen, a big bunch.

Q. Now, I believe you stated that you went to work about 7 o'clock in the evening and worked up until 11:20?

A. I don't know what time we quit work—we went to work seven o'clock some time.

Q. During that time you were working in this hole or pit, in which you were injured—who was working with you in there?

A. Some of the boys, I can't tell you the names; I don't know. [66—52]

Q. How many?

A. I didn't count them—I don't remember—the sailor crew and some longshoremen, I never counted them.

Q. You misunderstand my question. I am speaking about the time you were hurt—you went to work that evening on the night shift at seven o'clock?

A. Yes, sir.

Q. And you worked during that night up until 11:20? A. Yes, sir.

Q. And then you started for your lunch or dinner?

A. Yes, sir.

Q. Now, who was working in this pit with you from 7 o'clock until you left for your dinner at 11:20?

A. The fellow working with me was Johnny

(Testimony of John Pedrin.)

Schmitt—we were working together there, in the same place.

Q. Who else was working in that pit?

W. Well, there was some fellows, I can't tell you their names, I don't know them—the only man I know his name is Albert, that is the only name I can tell you was there, the rest of them I don't know; I don't know the names.

Q. Wasn't Schmitt working with you at that time?

A. Johnny Schmitt was working with me—that was the fellow working with me.

Q. And Albert was working in there also?

A. He wasn't working there; he was working in the pit; he was shoveling—shoveling snow out.

Q. Who else was working there besides you and Schmitt? A. The machine-man and his helper.

Q. What was he doing in there?

A. He was drilling. **[67—53]**

Q. Had they been drilling in there from seven o'clock until the time you left?

A. They didn't drill all the time—he got through with his drilling and loading so they could fire at dinner-time.

Q. What did he load it with?

A. With powder and fuse and caps.

Q. And he loaded before he started for dinner?

A. I can't tell you—I didn't watch him.

Q. You saw him working there?

A. Yes, I was around there.

Q. Now, then, who else was around there?

(Testimony of John Pedrin.)

A. Well, I don't know who—there was some fellows working in shifts; I don't know their names and don't know them, so I can't tell you who it was.

Q. When you went to dinner who went with you?

A. We all started out one ahead of the other—there is a little trail and we go along it.

Q. Do you know if this man who loaded this hole and bore the hole went to dinner with you?

A. I don't know.

Q. Do you remember whether Schmitt went with you?

A. He quit the same time I quit, but I don't know—he might have got ahead of me because he walked faster than I did, or I might be faster.

Q. Did Green go to dinner when you did?

A. No, he didn't go with me.

Q. You didn't see him? A. No.

Q. Do you know where he was when you went to dinner?

A. No, I don't know where he was. I don't remember exactly—I [68—54] don't know whether he was eating or not; sometimes he ate there with us, and sometimes he go to the blacksmith-shop and eat—I don't remember exactly whether he went there or not.

Q. You don't know where he was when you went to dinner?

A. No, I don't know where he was when I went to dinner.

Q. And you don't know where he ate his dinner?

A. No, I don't remember whether he ate it there

(Testimony of John Pedrin.)

with us or not—I can't tell; I don't remember.

Q. And you don't know where he was during the dinner hour? A. No.

Q. You didn't see him during the dinner hour?

A. No, I don't remember seeing him.

Q. The man who drilled the hole and fired the shot —do you know where he ate his dinner?

A. He ate his dinner in the house where we all ate.

Q. Did you see him eat his dinner?

A. I see him eating there; yes.

Q. Did you go to dinner before he did or after he did?

A. I can't tell you whether he went ahead of me or I went ahead.

Q. Then, you don't know if he remained there after he fired the shot or not, remained at the pit, stayed at the pit a while?

A. He couldn't very well stay there—if he is going to fire the shot, he has to go out of there.

Q. I mean after he fired the shot—you don't know where he went to dinner?

A. He went to dinner all right—I don't know whether he went ahead of me or I ahead of him. We all started to eat; we don't take notice who is behind the other—I never take attention to things like that. **[69—55]**

Q. You don't know whether he went to dinner before or after you? A. No, I don't.

Q. Now, then, after you had your dinner you came back and proceeded immediately to go to work—is that correct? A. Yes, sir, that is correct.

(Testimony of John Pedrin.)

Q. Did you make any examination of the place before you started to work, when you returned from dinner?

A. No, sir, I did not, because unless I go to work—he told me right away to do that work and get the powder and I went.

Q. And you didn't make any examination of it?

A. I came back and my partner was with me—he will tell you about it.

Q. Did you make any examination of it?

A. No, sir, I did not.

Mr. BORYER.—That will be all.

(By Mr. RITCHIE.)

Q. You said a while ago that this time when you were working the fifteen hour shift that you got straight time—when you were on the Sampson?

A. Yes.

Q. That is, you mean by that that you were paid for the time the boat was traveling? A. Yes, sir.

Q. So you were not working fifteen hours straight?

A. No, he pay me for the time the boat was traveling—I was getting pay—

Q. Just the same as when you were working?

A. Yes, excepting he didn't pay my eating hour, but he paid me when the boat was traveling. [70—56]

Q. In the work you have been doing since you came out of the hospital you have been able to use your left arm a little? A. Yes, I can.

Q. And the arm has been getting a little better, has it or not?

(Testimony of John Pedrin.)

A. Yes, it has been getting better, only this muscle is the only thing that bothers me—that is getting worse.

Q. Is the arm as strong as it was before you were hurt? A. No, it can't be.

Q. Can you lift half as much as you could before you were hurt?

A. I don't know. I never try to lift because I am afraid of it.

Q. Does it cause you any pain when you exert it?

A. Yes, sir.

By Mr. BORYER.—How long has this arm been bothering you?

A. It has been bothering me since I got it broke up there.

Q. Did you ever go to consult with the doctor about it, while you were there, after you left the hospital?

A. I told him about this muscle, and he told me it would come back in time, but I don't know what time it will be back.

Q. During the month of June you didn't go to see the doctor at all, did you?

A. No, because I thought it was no use to see him.

Q. During the month of May you didn't go to see the doctor, did you?

A. Maybe I see him for some cough medicine or some cold or something like that.

Q. Or stomach trouble?

A. Yes, maybe I did; I don't remember.

Q. Now, then, you came here—did you ever consult any physician here? [71—57]

(Testimony of John Pedrin.)

A. Yes, I was with a doctor here.

Q. What doctor? A. Dr. Boyle.

Q. Who sent you there?

A. I went myself to see him.

Q. When did you go to see him?

A. I saw him some time last month.

Q. Just last month?

A. Last month and this month—I have been *been* twice.

Q. You have been to see him twice? A. Yes.

Q. Your first time was last month?

A. I don't know exactly what time it was—I went one day, but I don't know whether it was last month or the month before—yes, the last month.

Q. You have been to see him twice? A. Yes.

Q. Why did you go to see him?

A. I went to see him because this muscle bothered me—and I went to find out if it was possible to be cured.

Q. You went to see him after you had started this lawsuit, did you not? A. Well, yes, I see him.

Q. You hadn't been to see him before, had you?

A. Yes, when I came from Latouche.

Q. That was in August?

A. Well, I came in, when I came from Latouche, but I had been here working for a while—I don't remember exactly. I can't tell you what day it was.

Q. (By Mr. RITCHIE.) As a matter of fact, I told you to go and see [72—58] Dr. Boyle, didn't I—isn't that correct? A. Yes, you told me.

By Juror FISH.—When you left Latouche, did

(Testimony of John Pedrin.)

you get fired, or did go of your own accord?

A. I left of my own accord.

By JUROR.—Don't you draw your wakes while you are in the hospital? A. No.

Q. Had you any other light except this lantern?

A. None except that lantern—that is all.

Q. That is all you had? A. Yes, sir.

(By Mr. BORYER.)

Q. You were not charged board during the time you were in the hospital?

A. No, sir, they didn't charge me board.

Q. And you were not charged for your physician?

A. No; we all pay that when we are working—every day we are working. They charge us so much a month for the hospital.

By JUROR.—Does the company there *had* an electric light plant?

A. Yes, they have a little electric light plant there.

JUROR.—There was none in the glory hole?

A. No, only to the main tunnel that runs from the level where the ore is—they got an electric light there quite a ways in the tunnel.

(By Mr. BORYER.)

Q. You had been working with this same light that you were using this night right along there, had you not, in that pit? [73—59]

A. We had that light there.

Q. And that was the only light you had?

A. When we started we had two lanterns—it was a soft night and one of the lanterns, the globes, went out and we only had one lantern afterwards.

(Testimony of John Pedrin.)

Q. The two lanterns gave you sufficient light to do your work by?

A. Sometimes it does and sometimes it didn't.

Q. When this lantern broke, what did you do?

A. I put it one side.

Q. You didn't ask for another lantern?

A. They didn't have any more, not around the work, than what they were using—pretty near all the globes broke.

Q. You had been working with that same kind of light ever since you had been working in that pit?

A. Yes, that lantern that was broke was my own because I pay for it.

(By Mr. RITCHIE.)

Q. Why didn't you go to a doctor here before I sent you to Dr. Boyle—was there any reason why you didn't consult a doctor about your arm?

A. What do you mean by that?

Q. I can't give you the answer—I know what you told me. Why didn't you go to a doctor before I got a doctor for you?

A. Well, I told you I was doing a little work and he told me any time—

Q. You don't understand the question. Why didn't you go to a doctor before you came to me, before you knew me?

A. Because I was broke—I had no money. [74—60]

(By Mr. BORYER.)

Q. You were there at Latouche a couple of months

(Testimony of John Pedrin.)

working? A. Yes, sir.

Q. And you were paying the company two dollars a day for a physician? A. Yes, sir.

Q. And you had the opportunity of going to him at that time, had you not, and talking to the doctor in regard to your arm?

A. I told him at that time about this muscle and he said come back again.

Q. I mean while you were at Latouche during July —during June and July you say you didn't go to see the doctor there about your arm but did go, perhaps, to get some cough medicine or something?

A. I might go; I don't remember exactly.

Q. You could have gone to him and consulted with him at any time, could you not?

A. Maybe I could.

Q. And it wouldn't have cost you anything, would it?

A. No, because we all pay for it—it would cost me something because I had to pay two dollars a month.

Q. And you had already paid for that?

A. Yes, sir.

Q. Taken out of your wages? A. Yes, sir.

Q. You left there the first of August and you drew down or you had earned $105.45 that month, hadn't you? A. Yes.

Q. And you drew your check just before you left, had you not, for your time? **[75—61]**

A. Yes, sir.

Q. And you had money then?

A. I had a little money—when I was in Latouche

(Testimony of John Pedrin.)

I was broke and I owed Johnny Wild a bill and I owed for rubber boots and a slicker when I started to work.

Q. You came away with a check for $64?

A. No; I came from there with about thirty or forty dollars when I left. I pay my fare out of that and when I arrive in Valdez I don't know where to go, whether there was any work around here, and I had to keep that money for eating and sleeping.

Q. Did you go to any physician here and tell him you were broke and that you wanted to consult with him in regard to your arm?

A. Well, I never did do that and I don't like to do a thing like that as long as I can go without doing that.

Witness excused. [76—62]

[Testimony of F. M. Boyle, for Plaintiff.]

F. M. BOYLE, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination.

(By Mr. RITCHIE.)

Q. What is your name? A. Frank M. Boyle.

Q. What is your business?

A. I am a practicing physician in Alaska.

Q. Where do you reside? A. Valdez.

Q. How long have you lived in Valdez, and practiced your profession here?

A. I have lived here for a period of twelve years.

Q. Are you acquainted with John Pedrin, the plaintiff in this action?

(Testimony of F. M. Boyle.)

A. I have met the gentleman.

Q. How long have you known him?

A. I have known him probably for a period of thirty or sixty days.

Q. Did you ever make an examination of him to find out about injuries he claims to have received?

A. I have.

Q. How often?

A. I have made two examinations.

Q. When was the first one?

A. I judge about three or four weeks ago the first examination was made.

Q. And when did you look at him again?

A. Yesterday.

Q. Will you have him bare his left arm so you can show to the jury his injury? [77—63]

A. It would be advisable to remove his shirt—take off your shirt.

(Plaintiff does so.)

Q. Now, just describe the various injuries you noticed there to the jury.

A. There is evidence of a fracture here of the left arm, the upper third. This muscle here is the biceps muscle; it has been separated from its attachment up above here.

Q. Go ahead and describe further the injury to the arm and the present condition and the probable permanent results, if there are any permanent injuries.

A. The separation of this biceps muscle here from its attachment has impaired the usefulness of this arm. This is the biceps muscle here. You can see

(Testimony of F. M. Boyle.)

how it is in a normal condition and see how it is here as the result of this separation; there has been an atrophy of the muscle as a result of having been torn from its attachment up above.

Q. Atrophy means a wasting away?

A. A wasting of the muscle. This muscle here normally is attached up above here and as the result of this injury it has been torn from its attachment here and is in its present condition—by a comparison here you can see the normal condition and the abnormal condition.

Q. Just describe any difference in the normal condition of his arm up there where you say the severing of the ligaments took place and the present condition.

A. There is evidence here of a fracture of the humerus which has united and it is in very good position, as far as the break is concerned, but it is torn away and separated from its attachment up here.

Q. Does that make any difference in the quantity of muscle and flesh there? [78—64]

A. Yes, by comparing the two arms here you can see the difference—this is the normal biceps muscle and this is the abnormal condition.

Q. What effect would that apparently have on his muscular strength and capacity for exertion?

A. As far as the left arm is concerned, it will materially lessen its usefulness.

Q. Do you consider that impairment of strength permanent or otherwise?

A. I am inclined to believe it is permanent.

(Testimony of F. M. Boyle.)

Q. Now, what other injuries did you discover evidence of?

A. Well, there is a punctured wound here on the left side—there is no bad effects noticeable from that; he spoke about a numbness around here. That is probably the result of some of the sensory nerves having been injured, but it is in no way permanent and nothing that will be of any serious nature. There was evidence here of the ribs having separated from the sternum or chest bone here, but they have united now and there is nothing there that is in any wise abnormal. This wound here on the face as you see has healed.

Q. The only permanent injury that you noticed is his left arm?

A. That is the only permanent injury, yes, sir.

Q. Do you consider the impairment of his strength extensive and serious as well as permanent, or not?

A. Well, it will impair the usefulness of his left arm as the result of this injury.

Q. In making your examination of that arm did it apparently cause him any pain?

Mr. BORYER.—I object to that. **[79—65]**

Objection overruled. Defendant allowed an exception.

A. In making the examination of the arm?

Q. Yes.

A. Well, there is no pain manifest upon an examination of the arm.

Mr. RITCHIE.—That's all.

(Testimony of F. M. Boyle.)

Cross-examination.

(By Mr. BORYER.)

Q. You say you examined him about three weeks ago the first time?

A. I wouldn't say exactly. I judge it was three or four weeks ago.

Q. What kind of an examination did you make at that time?

A. I had him strip. I went into the history of the case. I compared the injured arm with the opposite one and of course it was self-evident that there was a separation there of the biceps muscles.

Q. Did you base your opinion partly on the fact of your comparison of that arm to his right arm?

A. Yes, sir.

Q. Do you consider that his right arm is a normal arm?

A. The right arm, so far as the biceps muscle is concerned, it is.

Q. Did you examine the muscle of the right arm?

A. Yes, sir.

Q. What kind of an examination did you make of the muscle?

A. I tested it as to the development of the muscles and a comparison with the opposite muscles.

Q. What manner of test did you make?

A. Well, I endeavored to get the grip of the arm, his hand, **[80—66]** and was comparing it on the two sides and there was a marked impairment on the left side as compared with the right side; went into a history of the case and based my conclusions

(Testimony of F. M. Boyle.)
on what he stated.

Q. Based your conclusions, then, on what he told you?

A. I based my conclusions on my observations and upon what he told me.

Q. Then, as a matter of fact, you don't know whether he told you or gave you the facts correctly or not, do you?

A. I have every reason to believe that he did.

Q. Why do you believe that?

A. Well, the statements he made accord with the observations I made.

Q. Don't you know as a matter of fact that in taking his grip or having him work any muscle in his right arm, that that muscle is absolutely under his control?

A. I am fully cognizant of that fact and I gave that full consideration in drawing my conclusions.

Q. Then if he put into play certain muscles that you were trying to test him on, your conclusions would be based entirely on that, would it not?

A. My conclusions were based upon my vision to a great extent—it was self-evident that the biceps muscle was torn from its upper attachment and had furthermore undergone atrophic changes—atrophy.

Q. You couldn't see the muscle, could you, and the muscle of the arm is controlled entirely by the will of the man, is it not? In other words, when you want to make an examination of the muscles it is necessary for you to make your patient make certain movements, is it not? **[81—67]** A. Yes.

(Testimony of F. M. Boyle.)

Q. And then you watch the development of that muscle from those movements, do you not?

A. You partially base your conclusions in that way, yes.

Q. Don't you practically base your entire conclusions in that manner? A. Not entirely.

Q. What other test do you have of the muscles?

A. The other tests are oftentimes made; they consist of endeavoring to secure the grip and going into the history of the case, find out what facts you can.

Q. Now, then, let us go back to his left arm. You say that there is a wasting away of the muscle up at the portion of the arm where it is attached; is that correct? Is that what you mean by your medical term?

A. I mean to convey that there is a wasting of the biceps muscle; it has been torn from its upper attachments, and has, as you had opportunity to see here, undergone wasting changes.

Q. Is it adhered to its proper place now or not?

A. Has it now?

Q. Yes. A. No, it has not.

Q. Could you tell by an external examination?

A. Yes, sir.

Q. How do you reach that conclusion—how do you make that examination?

A. Well, by palpitation, that is, by the sense of touch and by ocular evidences—it is self-evident that there is an abnormal condition there. **[82—68]**

Q. Is it not a matter of fact that in any broken limb, as well as any other portion of your body, that

(Testimony of F. M. Boyle.)

if those muscles are not used that there is a general waste away and nondevelopment?

A. That applies to any of the extremities that are not in use—they will undergo atrophic changes or wasting changes when they are not in use.

Q. After you have a fractured arm or leg, during the time that the patient is confined to his bed, that limb is not used is it, ordinarily? And there is a general wasting away of muscle, is there not?

A. That doesn't necessarily always apply; when we have on what is known as ambulatory splints, permitting the limb or extremity to have certain movements, permitting the subject to exercise the limb, these wasting changes are not so manifest.

Q. But there are certain muscles that are not used, are there not? A. No.

Q. Those muscles become weak and waste away, do they not? A. Yes, sir.

Q. And it is not until after the patient is restored to such a point that he can use those muscles that they develop again, is it?

A. That is usually the case.

Q. And they do develop normally in course of time, when used? A. Yes.

Q. Now, then, as a matter of fact, the wasting away of that muscle may have been caused because he hasn't used the arm and that is the cause of it? **[83—69]**

A. Why, the muscle is torn from its upper attachment here—it is self-evident it is separated.

Q. It has adhered some other place, has it?

(Testimony of F. M. Boyle.)

A. It is torn entirely from up above.

Q. In what condition does that leave the muscle?

A. Well, the muscle has come down in a sort of lump there; it doesn't perform its normal function to the same extent it did before it was separated and as a result it has undergone these wasting changes.

Q. Now, then, you don't know what caused that, do you?

A. No, I don't positively. I can only go from the history of the case.

Q. From such facts as he told you?

A. From such facts as he has given me.

Q. You don't know whether that happened at the time his arm was broken or not, do you?

A. I have only got his statements for that and my own observations.

Q. You don't know whether it happened after that then, do you? A. After when?

Q. After his arm was broken—that he might have torn those muscles after that? Except from what he has told you?

A. I think it is very improbable.

Q. Why?

A. For the reason that to separate those muscles from the bone it was the result of some violent—either a blow or some violent action, and I can't conceive of a man subjecting himself to any violent action of any kind after an injury of that sort.

Q. You don't know, though, do you? **[84—70]**

A. I don't know, of my own knowledge.

Q. He might have had some blow since then?

(Testimony of F. M. Boyle.)

A. There might have been.

(By Mr. RITCHIE.)

Q. Do I understand that that condition could only result from a violent blow or a tremendous strain?

A. Yes.

Q. Longitudinal strain? A. Yes, sir.

Q. Has the plaintiff here a normal right shoulder?

A. No, he has not.

Q. Do you know the cause of that abnormality?

A. Only from the history of the case.

Q. Is that apparently from some previous injury?

A. It is apparently from an injury, yes, of very long standing.

Q. Does that abnormality have anything to do with his biceps muscles in his right arm? A. No.

Q. His right biceps are absolutely normal?

A. Yes, sir.

Witness excused. **[85—71]**

[Testimony of John Schmitt, for Plaintiff.]

JOHN SCHMITT, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination.

(By Mr. RITCHIE.)

Q. What is your name? A. John Schmitt.

Q. What is your business?

A. Mining and prospecting.

Q. Where are you working now?

A. I work here in the Cliff mine.

Q. You have worked at Ellamar? A. Yes, sir.

Q. How long have you been in this part of Alaska?

(Testimony of John Schmitt.)

A. I come here to Alaska in 1906.

Q. And you have been working as a miner most of the time since?

A. Yes, I work at mining and railroading.

Q. Did you ever work at the Beatson mine on Latouche Island? A. Yes, sir.

Q. When did you work there?

A. I worked there last year.

Q. Were you working there in the latter part of January? A. Yes, sir.

Q. Were you there when John Pedrin was hurt?

A. Yes, sir.

Q. Were you working with John at the time?

A. Yes, sir.

Q. What time did you go to work that day or night?

A. We went to work seven in the evening.

Q. Where were you working?

A. We started on the day shift to work on the bluff, off the pit, what they call a glory hole—threw the waste in a pile **[86—72]** and the ore we dumped in the chute; we took the car before the foreman come in and started to load the waste in the car and the foreman came in and gave me orders to go to load ore.

Q. Where were you working that night after seven o'clock—what part of the mine?

A. After seven o'clock we went to load ore.

Q. And how long did you work there?

A. I worked until half-past eleven.

Q. Was anybody working with you?

(Testimony of John Schmitt.)

A. John Pedrin.

Q. What were you and John doing?

A. Mucking in the raise.

Q. Was anybody else working there in the glory hole at the time?

A. No, just two men—you can't work any more men than two men to shovel there.

Q. Was there anybody else working close by?

A. No, about 15 or 20 feet, like that—in the pit.

Q. Were there any drillers working around there?

A. Yes. Cooney and what is that other fellow's name came from the Iditarod?

Q. Were they working near the glory hole?

A. They were working at the top, drilling holes right in the top, to shoot.

Q. Did they put in the powder while you were there?

A. We were mucking there, about half-past nine they get filled up, they get ready to shoot—

Q. All I want to know is what you and John were doing and what the drillers were doing before you knocked off at eleven. [87—73]

A. John and I were mucking and the other two men were drilling at the top.

Q. Did they put any powder in the hole before you left to go to dinner?

A. They were ready to, about ten or half-past ten, when he spring this hole and Mr. Cooney run the machine and Green say, "I want to give you orders"—

Q. Just tell what happened.

(Testimony of John Schmitt.)

A. Cooney was the machine-man.

Q. You quit work and went to lunch at half-past eleven? A. Yes, sir.

Q. How long were you gone to lunch?

A. Twelve o'clock; we start to work again after our lunch.

Q. Do you know whether any shots were fired while you were at lunch?

A. Yes, there was bulldoze on the big pit.

Q. Where did you go to work again after lunch?

A. We came after lunch at twelve o'clock and we start—I take the pinch bar and I want to pry this alongside of the glory hole where the shot went.

By the COURT.—He asked you where you went to work when you went back from lunch.

A. I came to the same place where I was.

Q. In the glory hole? A. In the glory hole.

Q. Who were you working with?

A. With John and Mr. Green.

Q. Who is Mr. Green?

A. He was the foreman of the night shift.

Q. Who were you taking orders from? [88—74]

A. From the foreman.

Q. From Greene? A. From Greene.

Q. Now, when you went back to the glory hole after 12 o'clock did you get any orders? A. Yes.

Q. From whom? A. From Mr. Green.

Q. What did he tell you to do?

A. He told me, he say, "John, leave alone that; I don't want to bar down; I want to draw from this chute." There was ten or fifteen boulders, big

(Testimony of John Schmitt.)
rocks, on the top of this raise there, raised from below, I guess about 80 or 90 feet. I don't know exactly how far it was from below, from the track, from the chute.

Q. Do I understand that Mr. Green told you, you and John, to go and bulldoze those rocks at the bottom of the glory hole?

A. Yes; he say, "I want to bulldoze those rocks as quick as I can. John, go and get powder and bulldoze that rock," and I said, "No, I don't go after powder; I have no right powder-monkeying—the powder monkey gets his wages; I get mucker wages. I want to bar down before I go bulldozing." He said, "Nothing doing; this ground is solid." I said, "By golly, I don't know; I have to try."

Q. What did you do when you went to work, you and John?

A. He told John and John went after powder and bring the powder and said, "John, don't you want to bulldoze? Green told me to bulldoze there at the top of the raise there, he want to draw for the chute, and I said, "I don't take no **[89—75]** chances until we bar down."

Q. Did you and John, after you got the powder, go ahead? A. Yes, sir.

Q. What kind of light did you have, if any?

A. A hand light.

Q. One of the jurors wanted to know about these lights—did you have just one lantern?

A. We had two—he had one and I had one.

Q. Where did you get those lights?

A. We get them from the company.

(Testimony of John Schmitt.)

Q. You bought them yourselves?

A. Yes, sir, we bought them ourselves.

Q. You had to furnish your own light?

A. Yes, sir—of course they had lights and lanterns, but they had no globes.

Q. What were you and John doing just before he was hurt? A. Mucking.

Q. What position were each of you in?

A. Mucking—I stay this way and he stay on the other side and mucking on this raise.

Q. What was John doing—what particular thing was John doing?

A. When he was ready to bulldoze—

Q. He was fixing the powder to bulldoze?

A. Yes, there was a raise like this corner exactly; it was raised right in the corner; there was a wall here and a wall here and was open about ten or twelve feet from this corner.

Q. John was at the bottom of the glory hole fixing the powder to break a big rock?

A. Yes, sir, he had first time about fifteen rocks on the top [90—76] chute or raise from below.

Q. Now, while John was fixing the powder on this rock, what were you doing? A. I hold the light.

Q. You held the light for John? A. Yes, sir.

Q. What happened, if anything?

A. What happened was, it was frozen ground and the rock came down and John was fixing the powder like that, and I see it move and I hollered to him to look out, and I started—I hollered, "Look out!" and there dropped a big slab on his back that came down,

(Testimony of John Schmitt.)

and he fell down on a big rock, enough to break his head.

Q. You got out of the way?

A. Yes, I was four or five feet behind.

Q. I understand this rock and frozen ground fell on top of him.

A. Yes, and he fell on his face and I thought he was dead, sure as anything.

Q. What did you do?

A. And then I set down my lantern and grabbed the rocks and rolled from him and grabbed for this slicker and pulled his head, and when I pulled his head I thought he was dead, sure, and he was bleeding all over, and I take his hand and feel his arm and it was just the same as like a piece of wax, and I started to go on the second floor and start hollering.

Q. Did you take any rock off of him before you left?

A. Yes, I rolled all the rock and muck and everything.

Q. Did that come down in a solid piece or did it break?

A. Yes, it was a solid piece and break in two pieces.

[91—77]

Q. You took it off of him and went for help?

A. I rolled it one side and grabbed for the slicker and pulled his head, and then I went on the second floor and started hollering, and three fellows came there and picked him up and carried him down on the second floor.

Mr. RITCHIE.—That's all.

(Testimony of John Schmitt.)

Cross-examination.

(By Mr. BORYER.)

Q. How long had you been working there in this glory hole? A. I guess about a week.

Q. How long had you been working at the mine?

A. I work five months.

Q. You worked there for about five months?

A. Yes.

Q. What portion of the mine were you working in during that time?

A. I don't know; the first time I start I take the muck from the top—there was a kind of tunnel, timbered with open planks, and it was solid muck on top, about 6 or 8 feet; it was red muck on top of solid ground.

Q. How long had you worked in this particular place?

A. This particular place I work about, I guess, a week, on this glory hole.

Q. That is the place where John was hurt?

A. Yes.

Q. And you had been working on the night shift?

A. Yes.

Q. All the time?

A. No, working about fifteen days on the night shift and fifteen days on the day shift. [92—78]

Q. Then you had worked about fifteen days on the night shift at this particular place, had you?

A. No, not in this particular place—they got no muck there before they shoot—they have nothing to do there in the glory hole.

(Testimony of John Schmitt.)

Q. Had you worked on the day shift at that place?

A. Yes, I did.

Q. About how long had you worked on the day shift at that particular place?

A. When they get lots of muck there.

Q. About how long?

Q. When they get lots of muck there we work all the shift and when they don't, we work five hours or three hours.

Q. Did you work there two weeks on the day shift?

A. Sure, when they get the muck.

Q. Had you worked there two weeks on the night shift?

A. Yes, worked three or four weeks on the night shift, sometimes.

Q. You had worked there then as long as two weeks prior to this accident? A. Sure.

Q. At night—on the night shift? A. Yes.

Q. Had John been working there with you during these two weeks on the night shift?

A. Sometimes he work and sometimes not—sometimes put another man there.

Q. Now, you say you went to work at seven o'clock on the 25th or 26th of January, the day John was hurt?

Q. Something like that—I can't tell exactly the date.

Q. And you remained at work until 11:20 or 11:30 that night, in that place? **[93—79]**

A. We have lunch at half-past seven.

Q. What were you doing? A. Mucking.

(Testimony of John Schmitt.)

Q. What do you mean by mucking?

A. Mucking a hole in the raise.

Q. That is, you were shoveling the ore?

A. Yes, in the raise.

Q. In the raise or shaft? A. Yes, in the hole.

Q. That was ore that had been shot down from the side wall, was it? A. Yes.

Q. Now, how long had these drillers been working in there that night? A. I guess three hours.

Q. Did they start to work when you started to work?

A. Yes, the machine was set when I came to work.

Q. The machine was set when you came to work and they came to work the same time you did?

A. Yes, sir.

Q. And then they started to drilling?

A. Yes, sir.

Q. They were drilling above you, were they?

A. Yes.

Q. About how far above you?

A. About four feet.

Q. About four feet? A. Yes, sir.

Q. How far away from them were you?

A. Four feet from the wall. [94—80]

Q. Four feet from the wall?

A. There is a wall—four feet from this side, from the wall and there was a hole right there in the corner.

Q. About how many feet away?

A. Well, I guess maybe 8 feet.

Q. What kind of a drill were they using, do you know? A. Steel, a 250-pound machine.

(Testimony of John Schmitt.)

Q. How was that machine fastened?

A. On three legs.

Q. It stood up on three legs?

A. Yes, it stood up on three legs.

Q. How many men were working in that?

A. Two men—the machine-man and the chock-tender.

Q. Do you know their names?

A. Cooney was the machine-man and I can't tell you this man that was chock-tender.

Q. You saw them working there?

A. Yes, I saw them working there.

Q. Did you see them drilling? A. Yes, sir.

Q. And you are certain they were working there about three hours? A. Yes, about three hours.

Q. That would make it about ten o'clock they quit drilling? A. Yes.

Q. What did they do when they finished drilling?

A. They spring their hole.

Q. How do they spring their hole?

A. They put powder in two or three sticks or four sticks and spring it and next about eight sticks, and then they can't [95—81] get powder enough, they have to put maybe fourteen sticks.

Q. How many times did they spring this hole that night? A. Two times.

Q. They sprung it twice while you were there working? A. Yes, sir.

Q. What did you do when they were springing those holes?

A. When they were springing the hole they tell me

(Testimony of John Schmitt.)

to get out—to get out from the smoke.

Q. And you and John went out, did you?

A. Yes, sir.

Q. And then you came back and started to work again? A. Yes, sir.

Q. You went out two or three times?

A. Two times.

Q. Twice only? A. Yes, sir.

Q. After they sprung the hole what did these men do? A. Cooney asked Green, he say—

Q. Answer my question—after they had sprung this hole what did they do?

A. Green came out—

Q. What did these drillers do?

A. Cooney wanted to get powder—he says "I want to spring a third time."

Q. Did he spring a third time? A. No.

Q. What did he do then?

A. Green don't allow it.

Q. What did the drillers do then?

A. What the drillers done they done by Mr. Green's orders.

By the COURT.— [96—82] You can be asked later to explain by Mr. Ritchie, but answer these questions—tell what the drillers did, whether they put in another spring, put in the main blast or what.

Q. What did the drillers do then?

A. The drillers did it by Mr. Green's orders.

Q. Did they do any work?

A. No, they had orders.

Q. I ask you what they did.

(Testimony of John Schmitt.)

A. Mr. Green told them, "Load this hole and blast."

Q. Did they load the hole then? A. Yes, sir.

Q. How many sticks did they put in it, do you know?

A. I don't know; I never count it.

Q. Did you see them loading the hole?

A. No—I see them loading the hole.

Q. Did you or did you not see them loading the hole? You said yes and no.

A. Yes, I see them loading the hole.

Q. They had worked now up to ten o'clock springing the hole and then they loaded the hole—about what time was it then?

A. It was ten o'clock when they made the second spring and Mr. Green came over and he see Cooney. He say, "I want to make one more spring," and he said, "Never mind one more spring; load this hole and blast."

Q. Now, what time was it when they had finished loading the hole? A. It was about half-past ten.

Q. Did they fire the shots then?

A. They fired the shot lunch-time.

Q. After they had loaded this hole at half-past ten you didn't go to dinner until about 11:20, did you? [97—83] A. Yes, sir, 11:25.

Q. Was this shot fired between—after it was loaded and the time you went to dinner?

A. It was after we went to lunch.

Q. Did you see it shot? Were you there when they shot it off?

(Testimony of John Schmitt.)

A. Yes, I saw it when we came back after lunch.

Q. Were you there when the shot was fired?

A. No, I never was there when the shot was fired.

Q. Did you hear the shot fired?

A. I heard several shots fired.

Q. Did you hear these particular shots fired?

A. Yes, sir.

Q. Where were you then?

A. I was close to the house where we had lunch.

Q. How do you know it was these shots?

A. Because the different signals, the different sound from the bulldoze and the big shot.

Q. You could hear it distinctly, could you?

A. Yes, sir.

Q. And who was with you when you heard it?

A. All was pretty near there.

Q. Was John there?

A. All was there pretty near.

Q. Was John there?

A. I don't know,—I can't tell exactly whether he was there or not.

Q. You say there was some bulldozing being done while you were down there working that night?

A. Yes, sir.

Q. Before you went to dinner? [98—84]

A. When I got to bulldoze I have to report for the big shot and I got report for the big shot—

Q. Repeat that.

A. When I got report for a big shot and have got big boulders there, five or six boulders, and we

(Testimony of John Schmitt.)

have to wait for report, before he give me report and let me bulldoze.

Q. You were helping to do some bulldozing down in there that night? A. Yes, sir.

Q. Before you went to dinner? A. Yes.

Q. John was helping you? A. Before dinner?

Q. Yes.

A. Yes, we had a couple of bulldozers there in the pit.

Q. About how many shots do you fire in the bottom? A. About four or five.

Q. You fired about four or five that night before you went to dinner? A. Yes, sir.

Q. How heavy were the charges?

A. Two sticks.

Q. What number? A. Forty per cent.

Q. Do you know where Mr. Green ate his dinner that night?

A. I don't know. I never see him eating his dinner.

Q. After this shot was fired, do you know where Mr. Green was?

A. No, I don't know where he was.

Q. You don't know where he ate his dinner?

A. No. [99—85]

Q. You didn't see him from that time until you returned to the pit?

A. To the pit—no, sir.

Q. Then you saw Green there, did you?

A. Yes, sir.

Q. These drillers fired this shot, did they?

(Testimony of John Schmitt.)

A. Yes, sir.

Q. Did you see the drillers when they were at dinner or not, do you remember?

A. I saw him in the shed there.

Q. What do you mean by the shed?

A. They had a shed there—they had lunch in the shed; I saw him there.

Q. Did you have lunch there in the same place?

A. Yes, we all had lunch the same place.

Q. Now, then, did you see these drillers after they had fired this shot—between the time that they fired the shot and the time that they came to dinner?

A. No.

Q. You didn't see them? A. No.

Q. You don't know where they were? A. No.

Q. You don't know what they were doing?

A. No.

Q. When you went back, did you see the drillers then? A. Yes, Cooney was there.

Q. What was he doing?

A. He don't do nothing; he was just standing and looking.

Q. Was he one of the drillers? [100—86]

A. Yes, he was the machine-man.

Q. Where was the other driller?

A. The chock-tender? I don't know; I never saw him.

Q. You say you took a bar and tried to do something—what was that?

A. Yes, I took a bar and tried to get loose the rock and bar down.

(Testimony of John Schmitt.)

Q. Bar what down? A. After the shot.

Q. Why did you take a bar to bar it down?

A. Because I know the rule for firing—they have to look at this ground, if it is loose or not.

Q. What do you mean by rule?

A. A rule, when they are going to shoot any place, when they blast on a railroad or mine, they have to examine the place before they go to work.

Q. They have a rule there that you have to examine your place? A. Yes.

Q. Is that known to everybody there?

A. Yes, sir.

Q. And if you think there is any loose earth there or rock, it is your duty to bar it down, is it?

A. I never saw it.

Q. If there is any loose earth or rock there, after you make your examination, then you take your bar and bar it down?

A. I have to make the examination and take the bar and find out whether it is loose or not.

Q. And if it is loose, you bar it down?

A. Yes, sir.

Q. And what kind of a bar do you use for that? [101—87]

A. A pinch-bar.

Q. They furnish the bar? A. A company bar.

Q. They require you to do that?

A. I don't know whether they require it or not but I like to save my life before I go down.

Q. And did you try to bar that down?

A. No, he don't allow me to try—Mr. Green stopped me.

(Testimony of John Schmitt.)

Q. You took the bar and what did you start to do?

A. I took the bar and walked from this end all around to the pit, to the glory hole on the other side, and Green came over and say, "John," he say, "I want you to bulldoze here on this raise. I want ore for this chute." "Well," I say, "I don't know. I want to bar down before I go down." He said, "Never mind; it is solid."

Q. He told you it was solid?

A. Yes, he told me it was solid; he never was there —I don't know, but I never was there; he told me it was solid.

Q. You don't know whether he was there or not?

A. I drop my bar then and he told me to go and get powder to bulldoze. I said, "No, I don't get powder." I said, "I get no wages for powder monkey. I get wages for mucker," and I stand there, and he went into the pit and called John Pedrin, and he went after powder and brought powder and to John I say, "I don't take no chances going down there."

Q. You said that to John?

A. I said that to John. Green was there and Green he say, "Never mind, John, it is all solid"—it was sloppy and rain and snow—and I say, "I don't want to bulldoze." "Well," he say, "Go and help John; hold the light," and I say, "All right, I will go [102—88] and hold the light," and it was exactly like this corner, and it was raised there and it was a wall here and a wall here and an open hole here, about 20 feet—it was the first floor, open pit, and we finish this end and start to sink a hole 20

(Testimony of John Schmitt.)
feet and muck this hole and the raise and from below, the first floor, run a car right across the shoot and draw from this raise, right to the car and dump it into the ore chute.

Q. What did John say to you when you told him you took no chance going down there?

A. He didn't say nothing.

Q. He didn't say anything? A. No.

Q. Did you tell him that it was dangerous?

A. No, I didn't tell him—I told to Mr. Green and Green sends—

Q. He told you he thought it was all right?

A. Yes, Green tells it was all right.

Q. You didn't examine the place where they had made the shot, did you?

A. He don't allow me to examine.

Q. You didn't examine it?

A. He don't allow me to examine.

Q. Answer the question: Did you examine the place?

A. He don't allow me to examine it. I want to examine it,—I took a bar but he stopped me.

Q. Did you examine the place?

By the COURT.—Say yes or no, whether you examined it or not. A. No.

Q. Do you know if John examined the place?

A. No.

Q. You don't know. [103—89]

A. I don't know.

Q. Then you didn't see the condition of the wall after the shot had been fired, did you?

A. No, it was all broke up there on the wall.

(Testimony of John Schmitt.)

Q. Could you see that? A. Sure, I can see that.

Q. From where you were working?

A. You take a light you can see where it is all broke up, the wall cracked.

Q. Did you see that from where you were working?

A. No, you couldn't see from where I was working—when I go on top.

Q. Was it a perpendicular, a straight up and down wall? A. Yes, straight up.

Q. And then you have to go on top and look over it? A. Yes, sir—we had a step-ladder.

Q. Did you go up on a step-ladder?

A. Why, sure, when you come out from below, you have to come out with a step-ladder.

Q. You were working about four feet from where the shot was put in, were you?

A. Yes, sir—about 8 feet.

Q. About four feet above your head?

A. Four feet from the wall, about 20 feet above the head.

Q. I mean from the place where the hole was drilled in, where the shot was made—how far was that above your head? A. About 20 feet.

Q. I understood you to say the pit was about 20 feet deep?

A. The glory hole was about 20 feet, yes.

Q. That is the hole you were in? [104—90]

A. Yes, the bottom.

Q. Then was the shot clear outside of the glory hole?

(Testimony of John Schmitt.)

A. It was a straight wall; this is the wall; this is the first floor here and about twenty feet from this floor to the second floor.

Q. But where was it they put the drill in?

A. Four feet from the wall, back.

Q. Was the wall cracked along clear down to the bottom, after the shot?

A. You can see cracks, not from the bottom but from the top.

Q. You could see the cracks there?

A. The wall never break—they didn't have powder enough to break this ground.

Q. Now, you are a miner of some experience?

A. Yes, sir.

Q. How do you do this barring down?

A. Barring down when the shot is out?

Q. Yes.

A. You have to examine this place when the shot is out, whether a man can go down or not; if he can't go down, we have to bar down the rock, take a bar and hammer and work it; you have to look at your roof to see whether it is safe or not—when you work in the pit, you have to look at your walls.

Q. Who has to look?

A. That man that is working in there.

Q. All the men that are working there?

A. Yes, sir.

Q. And you say the rule of the company requires you to look and examine the ground and bar it down before you start to work? **[105—91]**

A. The company has got foremen there that don't

(Testimony of John Schmitt.)

allow them to do that.

Q. The rules, though, require you to examine it and bar it down? A. Yes, sir.

Q. That is a rule of the company?

A. I don't know whether the company or not but the rules all in the United States, all over.

Q. That is the rule there, is it? A. Yes, sir.

Q. Who is superintendent of that mine, do you know? A. Mr. Van Campen.

Q. And general manager of it? A. Yes, sir.

Q. What was the name of this foreman you were talking about? A. Green.

Q. He was shift boss there, was he?

A. Yes, he was the shift boss.

Q. Now, then, Mr. Ritchie asked you something about lights there—this glory hole was constantly changing, was it not, by reason of breaking down of the walls from the shooting and blasting?

A. Yes, sir.

Q. And the hole was gradually getting larger?

A. Yes.

Q. And it was necessary to do shooting all around there in order to get the ore out, was it not?

A. No, they have to shoot from the top.

Q. What I mean by that is, around through that and the other [106—92] places around this hole:

A. You can't shoot any other way—you have got to shoot down from the top.

Q. They do blasting there then, do they not—break the ore down by that means? A. Yes.

Q. It wouldn't be feasible to have electric lights

(Testimony of John Schmitt.)

there, would it, if you had to do blasting around there?

A. Oh, yes, you can have electric light if you want to.

Q. How could they put an electric light in that hole if you are breaking down on the side?

A. You don't have to put it in the hole—you can put it on the hill.

Q. How far away would you have to put it?

A. Not very far away, 20 or 25 feet.

Q. That is on the outside of the hole?

A. There is red muck right to the glory hole, 8 or 10 or 12 feet. There is a mountain of red muck.

Q. Weren't they blasting all around through the large pit there that surrounded the glory hole?

A. They can put an electric light down.

Q. Were they blasting all around this place?

A. At different times around there—that pit was about 50 feet wide, I guess.

Q. And they were blasting around in that pit right along? A. Sure, they have to blast it.

Q. And then you would have to be moving your electric lights around from place to place?

A. Just take the wire down, that is all.

Q. Just take the wire down every time you wanted to blast? **[107—93]**

A. Well, that is all that is necessary.

Q. You had been working there for about two weeks, using the same kind of light that you were using that night, had you not?

A. Oh, yes—no, I work about five months with that same light.

(Testimony of John Schmitt.)

Q. And you had worked about two weeks in this pit with that same light, had you?

A. Yes, we had no other light.

Q. And John had worked with you?

A. Yes, sir.

Q. And you did your work in that pit by these lights,—what work you did there you did by means of those lights? A. The mucking.

Q. That is the only light you had?

A. Yes—sometimes we break a globe and we have no globe and we have to work with one light, two men.

Q. The globes were down in the store?

A. They have to buy them—you can't get them from the company for nothing.

Q. You furnished your own lights, then, did you?

A. Yes, sir.

Q. As a matter of fact, you can get lights from the company, can you not?

A. I never had no lights.

Q. Never had any lanterns there?

A. They had lanterns but no globes; they have a store there, about three-quarters of a mile from the mine.

Q. It was necessary, it was required of you then, to furnish your own lights?

A. Sure, not all men but pretty near all; before I start they [108—94] had company lights but when they had these globes, they had lots of lanterns and no globes—you have to buy your own lantern when you want it.

(Testimony of John Schmitt.)

Q. You were required to furnish your own light in order to do your own work with?

A. Yes, sir—it was the company's work.

Q. To do the work you were doing?

A. Yes, sir.

Q. That was part of your employment and part of the things you had to furnish was your own light?

A. Sure, if the company had none you have to buy your own light.

Q. You had to furnish your own light then?

A. Yes, sir.

Q. And that was part of your employment and part of the things you had to furnish?

A. You can't work in the dark.

Q. Now, then, the light you had this night was sufficient, I believe you stated here that you saw it when it started moving—the light you had that night was sufficient for you to see this earth and rock that came down and struck John—to see it when it started moving? A. Sure.

Q. You could see that?

A. His light is gone out and I held my light that way (indicating), and I never look for his work. I look for the wall and when it start moving, I start hollering, and he had no chance to get out and it hit him right on the back.

Q. You told Mr. Ritchie that you saw it when it began to move? A. No.

Q. What did you say? [109—95]

A. I saw where he put the powder—it was between two bulldozes; he had one bulldoze here and

(Testimony of John Schmitt.)

along here and one in the front and then I start hollering and it dropped rocks and muck on his back and he fell down and I thought he was dead.

Q. Am I mistaken or not in that you said on your direct examination that you saw this earth and rock moving?

A. Yes, I saw it when it start moving, sure.

Q. Where did it come from?

A. Right from the top.

Q. Then you could see to the top, could you?

A. You can see certainly—you can see—if you get exactly the light, you can see.

Q. And your light was such so you could see?

A. I had a light, a hand light.

Q. Then, if you could see it at that time, when you started to work there, you could see it by the same light, could you not?

A. Sure, I can see it by the same light.

Q. Did you look up to see the condition of it when you started to work there?

A. They don't allow us to see.

Q. Nobody can stop you from looking?

A. Green said it—he is the foreman there—Green stopped it.

Q. He stopped you from looking up there?

A. Sure; he is the boss here or manager—I take the order you say and have to do by your order.

Q. Do you mean to tell the jury that Green told you not to look up there?

A. He say, "Never mind; go and bulldoze that—I want to draw for this chute right away." [110—96]

(Testimony of John Schmitt.)

Q. Did you look up?

A. No, I had no chance to look up; they stopped me. I had a bar in my hand.

Q. I understood that was when you were on top?

A. Yes, I was on the top.

Q. When you went down in the pit, did you look up to see the condition of it, down in the glory hole?

A. No, I never went right to the glory hole,—I started down to the muck.

Q. You went down to the point where you were going to do this mucking or bulldozing?

A. No, I never went there—I stayed over about 12 feet from this corner, like this, and looked.

Q. When John came back with the powder, you went down into this pit with John, did you not?

A. Yes, sir.

Q. And started to bulldoze it? A. Yes, sir.

Q. When you went down in this pit, did you look up to see the condition of the wall?

A. No, we had no chance to look up; they didn't give us a chance to look up.

Q. Where did Mr. Green go?

A. He went to the pit,—he went maybe to sleep in the powder-house, I don't know. He is not foreman any more there,—he don't know more than a Siwash woman.

Q. He was just pit boss, was he?

A. I don't call him boss and nobody call him boss that is working there.

Q. He was an ordinary laborer? [111—97]

A. Certainly, worse than laborer—a laborer under-

(Testimony of John Schmitt.)

stand more of the work than this foreman that was there.

Q. Now, where did he go?

A. I don't know; I never watch for him.

Q. Did he go down in the pit?

A. I don't know where he went.

Q. You don't know whether he was down in the pit or not when you and John went down?

A. I don't know. I guess he was in the powder-house when they took that fellow to the hospital.

Mr. BORYER.—That's all.

(By Mr. RITCHIE.)

Q. Mr. Green held the position as shift boss, did he not?

(Objected to as leading. Question withdrawn.)

Q. What position did Mr. Green hold?

A. Foreman, shift boss.

Q. How old a man was Green?

A. I don't know how old he is. 22, I guess—24.

Q. You said a while ago it is a rule all over the United States to bar down the walls after a shot?

A. Yes—when a man wants to be safe.

Q. You mean that is a rule of good mining or a statute law? A. Yes, that is a law of mining.

Q. That is a rule of good mining? A. Yes.

Q. Did this company have any such rules?

A. I don't know,—I don't think so.

Q. Did they have any such rules typewritten—written and posted? [112—98]

A. I don't think so.

Q. Did the foreman ever tell you of any such rule,

(Testimony of John Schmitt.)

or the superintendent?

A. The superintendent don't tell me.

Q. It is simply a rule of good mining?

A. Yes, sir.

(By Mr. BORYER.)

Q. You don't know of your own knowledge what this man Green's position was with the company?

A. He was foreman.

Q. Do you know of your own knowledge?

A. No, I don't know.

Q. You don't know what authority he had?

A. No, I don't know.

(By Mr. RITCHIE.)

Q. What is a powder monkey?

A. A powder monkey is supposed to get primers and powder.

Q. He has charge of the powder-house?

A. He has charge of the powder-house.

Q. You said a while ago that you refused to act as a powder monkey? A. Yes, I refused.

Q. You meant by that that you refused to go to the powder-house? A. Yes, sir.

Witness excused. [113—99]

[Testimony of William Gleason, for Plaintiff.]

WILLIAM GLEASON, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination.

(By Mr. RITCHIE.)

Q. What is your name? A. William Gleason.

Q. Where do you reside? A. Lakeside.

(Testimony of William Gleason.)

Q. How long have you lived in Alaska?

A. About two years.

Q. What is your business? A. Mining.

Q. How long have you been a miner?

A. Twenty-five years, I guess.

Q. Where did you first work as a miner?

A. In New Mexico.

Q. Where else have you worked in the States and territories?

A. I worked in Lake Superior, British Columbia, Alaska and Arizona.

Q. You were working constantly or nearly so as a miner from the time you started at it until you came to Alaska? A. Pretty much; yes.

Q. And have worked a good deal in Alaska as a miner? A. Yes, sir.

Q. Have you worked in large mines and particularly copper mines? A. Yes.

Q. Are you an expert miner or a pretty good miner? A. I don't know.

Q. Have you done all kinds of work as a miner?

A. Yes, pretty much. [114—100]

Q. Have you drilled much? A. Yes, sir.

Q. Can you run a machine drill? A. Yes, sir.

Q. You have worked at all kinds of mining?

A. Yes.

Q. Now, where a shot is fired in the walls of a mine, particularly an open mine or a glory hole, is there any rule about making an inspection of the surrounding walls immediately afterwards?

Mr. BORYER.—I object to the question for the

(Testimony of William Gleason.)

reason that it is incompetent and immaterial and for the further reason that there is no such question raised in the pleadings, and for the further reason that there is nothing in the case that would warrant the asking of such a question and that the defendant would not be bound by any answer made in response to this question.

By the COURT.—I understand there is an allegation in the complaint to the direct effect that the rule of good mining required that such be done, but the question I am not so clear upon is, whose duty it is to do it, whether it is the man who is in danger himself or whether it is the duty of some one else—that is the important question.

After argument the objection was by the Court overruled. To which ruling of the Court counsel for defendant is allowed an exception.

A. Ordinarily.

Q. What is that—what is the usual course of procedure?

Mr. BORYER.—In order to avoid encumbering the record I want the same objection to go to all similar questions.

(It is so understood and exception allowed.) **[115—101]**

A. The rule is that a man has got to bar down his ground to make it safe, not to have loose ground in the walls after a blast—that is, if a man is going to work under it.

Q. Where work is being done under the direction of a foreman or shift boss who looks after that?

(Testimony of William Gleason.)

Mr. BORYER.—We object to the question, for the reason that it is immaterial and incompetent, and for the further reason that it has not been shown that this work was under the direction of a shift boss or foreman.

Objection overruled. Defendant allowed an exception.

A. Why, the foreman or shift boss who is in charge.

(By Mr. BORYER.)

Q. Who does the work?

A. The miner, I suppose.

Q. The men working in there you mean?

A. Yes, sir.

Witness excused.

Plaintiff rests.

Mr. BORYER.—I have a motion to present—

The jury having been excused—

By Mr. BORYER.—Comes now the defendant, the Beatson Copper Company, by its attorney, R. J. Boryer, and moves the Court for a nonsuit in this action for the following reasons:

I.

Because the plaintiff alleges in his complaint that he is an experienced miner, capable of earning the highest wages for mining; that his evidence shows that he has followed mining for [116—102] several years; that he had worked in and around the place where he was injured ever since beginning work for the defendant company and had been working in the pit or hole where the accident occurred for about

(Testimony of William Gleason.)

two weeks and knew the conditions surrounding the place where he was working; that he admitted he had seen the driller bore the holes and load same and heard the shots fired at the place or point where his injury happened, and which shot or shots the plaintiff claims in his complaint was the cause of the earth falling and injuring the plaintiff.

II.

For the further reason that the plaintiff himself, although being an experienced miner and knowing that the shots complained of in his complaint had been fired at the place mentioned in his complaint, which caused the injury, proceeded to work without either examining or in any other manner trying to ascertain the condition of the place where he was going to work.

III.

For the further reason that the plaintiff has failed to show or establish what relation, if any, the foreman or shift-boss bore to the defendant and the duties, responsibility and authority of said foreman or shift boss in connection with the defendant company, while the evidence does show that said foreman or shift boss was engaged in a common employment along with the plaintiff and was a fellow-servant.

IV.

For the further reason that the plaintiff has failed to show that the defendant company was negligent in any manner and has failed to establish and make out a case against this defendant.

After argument the Court took the matter under advisement [117—103] and further hearing of the case was adjourned until to-morrow morning at 10 o'clock.

Tuesday, November 11, 1913.

MORNING SESSION.

By the COURT.—In this case on the motion presented last night I may say that I am not free from doubt in the matter, but following the well recognized and established rule I believe the doubt should be resolved in favor of submitting the case to the jury, and the motion will therefore be denied and defendant allowed an exception.

DEFENSE.

[Testimony of L. V. Smith, for Defendant.]

L. V. SMITH, a witness called and sworn in behalf of the defendant, testified as follows:

Direct Examination.

(By Mr. BORYER.)

Q. What is your name? A. L. V. Smith.

Q. Where do you reside? A. Latouche.

Q. What is your profession? A. Physician.

Q. How long have you been practicing as a physician?

A. Seven years—a little over seven years.

Q. Are you a graduate of any school?

A. Yes, sir.

Q. What school?

A. Willamette University, Medical Department.

Q. Where did you begin your practice?

A. In Oregon.

(Testimony of L. V. Smith.)

Q. How long did you practice there?

A. Two years—a little over.

Q. Where did you next practice? **[118—104]**

A. Nevada.

Q. How long were you practicing there?

A. A little over two years.

Q. Where next? A. Latouche.

Q. How long have you been in Latouche?

A. Three years, a little over.

Q. Are you the physician for the company there?

A. The Beatson Copper Company, yes.

Q. Who is superintendent and manager there?

A. Mr. Van Campen.

Q. Were you employed there at the time John Pedrin was injured?

A. Yes, I was physician of the company.

Q. Did you attend him as a physician?

A. I did.

Q. Do you recall what time he was received in the hospital?

A. In the latter part of January, the 25th or 26th,—I don't remember the exact date.

Q. Do you recall when he left the hospital—was discharged from the hospital?

A. I don't remember the exact date.

Mr. RITCHIE.—I would suggest if you have any record of that it would be the best evidence.

Mr. BORYER.—It was on or about the 25th of March, was it not? I think it has been admitted here he went to work on the 25th of March.

(Testimony of L. V. Smith.)

Mr. RITCHIE.—It was about the 25th of March, was it, Doctor?

A. I don't really remember the exact date—the pay-roll would show.

Q. Now, Doctor, you saw Pedrin around there from time to time until he left there, did you not? [119—105]

A. Yes, sir.

Q. Did you notice what he was doing?

A. He was working around the camp there.

Q. Did you see him shoveling coal, handling coal, etc., there? A. I did.

Q. Do you recall when you made your last examination of the arm?

A. It was the latter part of May.

Q. What was the condition of the arm at that time?

A. Well, the arm was in perfect condition as far as results go, the break; there was no deformity, perfect action, no shortening of the limb.

Q. Were the muscles detached from their original place of attachment?

A. Not that I noticed. I massaged the arm, at that particular time; the muscles were flabby, of course, from nonuse.

Q. That is a natural condition?

A. That is a natural condition existing after six weeks of rest.

Q. Did you watch him there in his work to notice the action of this arm? A. I did.

Q. Tell the jury what you noticed in his work.

(Testimony of L. V. Smith.)

A. I noticed he was able to work with the arm as well as could be expected from an injury, that is, so soon after the injury.

Q. Did you notice him working later on, shoveling coal and things of that kind? A. Yes, sir.

Q. Did he use that arm then? [120—106]

A. Yes, sir.

Q. Now, then, you say you made your last examination some time in May? A. Yes, sir.

Q. Did he ever come to you between that time and the first of August to consult you regarding the arm?

A. No, sir.

Q. From your experience as a physician and your examination of the arm, would you say that that arm was in such a condition at that time that he would suffer permanently from it? A. No, sir.

Q. Are you acquainted with Mr. Green who has been spoken of here in this case? A. Yes, sir.

Q. Do you know where he is? A. No, sir.

Q. Is he working for the company?

A. No, sir.

Mr. BORYER.—That's all.

Cross-examination.

(By Mr. RITCHIE.)

Q. How long since Mr. Green has been working for the company?

A. I don't know how long—how long since?

Q. Yes—how long since he left there?

A. I don't remember; a couple of months, I think.

Q. It wasn't your duty to take much notice of the coming and going of employees?

(Testimony of L. V. Smith.)

A. Well, I was acquainted with Green. I remember when he left but I don't remember the date.

Q. Was it last spring? [121—107]

A. No, it was this spring.

Q. What time of the day was it that Pedrin came to the hospital—when they brought him in?

A. It was after midnight.

Q. Where is the hospital at Latouche?

A. Why, it is right in front of the store there.

Q. How large a building is it?

A. I think it is 8 feet wide by twenty-some long. I am not sure.

Q. Has it the general equipment of a hospital, that is, as far as a small hospital could have it?

A. Yes, of that size.

Q. Good beds and cots?

A. Yes, regular hospital beds.

Q. What injuries, if any, were shown on Pedrin's body and limbs when you first saw him?

A. He had a laceration of the face, a laceration of the side, the left side and a broken left arm, the upper third.

Q. The bone of the left arm was broken?

A. Yes, sir.

Q. Where? Just below the shoulder?

A. No, it was the upper third, up in the middle third.

Q. Indicate on your left arm where the fracture was. A. The upper middle third of the arm.

Q. Was there any laceration of the biceps muscles? A. It wasn't in evidence at that time.

(Testimony of L. V. Smith.)

Q. Were the ligaments detached?

A. That is pretty hard to discover at that time.

Q. Could you make the discovery later?

A. I could; yes.

Q. Was there any such detachment of the ligaments? [122—108]

A. No, sir.

Q. None of them were ruptured at all?

A. No; the action of the muscles of the arm showed there was perfect action.

Q. There was nothing wrong with the muscles except the incidental strain that might come upon them by reason of the fracture of the bone; is that correct? A. That is correct.

Q. How often did you see Pedrin in the first few days? A. Every day.

Q. And he was there under your constant care?

A. Yes, sir.

Q. What was the extent of this laceration on his breast, how deep was the cut and how long was it?

A. It was about four inches long, extending near the arm-pit in the pectoral muscle.

Q. Was there more than one injury on his body?

A. There was just the one laceration.

Q. Beginning here, near the left nipple?

A. It was over further.

Q. A little nearer the shoulder?

A. In the muscle, in the pectoral muscle, at the side.

Q. Toward the side? A. Yes, sir.

Q. Was the muscle detached from any of the ribs?

(Testimony of L. V. Smith.)

A. No, sir.

Q. How did you heal that laceration of the body?

A. By suture.

Q. Did you bind it up with bandages or straps around his body? A. Yes, sir. **[123—109]**

Q. Were you in court yesterday when he stated that he had his body bound up for a long time?

A. Yes, sir.

Q. Was that correct? A. Yes, sir.

Q. How long was he obliged to lie with his body bound up in this way?

A. He was in bed twenty-one days.

Q. The object of that, of course, was to keep the flesh or muscles of the body immovable so they would heal perfectly? A. No, sir.

A. What was the object of it?

A. It was with the object of correcting the fractured rib.

Q. There was one fractured rib? A. Yes, sir.

Q. Where? A. Near the sternum, the third rib.

Q. It wasn't necessary then to keep his body bound in order to enable the muscles or flesh to heal properly? A. No.

Q. Now, you examined this arm from time to time while he was there? A. I examined it twice.

Q. He remained in bed you said twenty-one days?

A. Yes, sir.

Q. You examined it twice after he got out of bed?

A. Yes, twice after.

Q. Once twice? A. Only twice.

Q. How long did he stay in the hospital after he

got out of bed? **[124—110]**

A. Well, he was off and on in the hospital about six weeks.

Q. Do you remember of your own knowledge when he first began to do some kind of work around there?

A. I can't remember the date. I see him working around there.

Q. What did you see him do?

A. Well, he was cleaning up around the bunkers, loading the cars.

Q. How would he do that work?

A. Shoveling it.

Q. Did you watch him closely to see how he worked? A. I was interested in the arm, yes.

Q. Is he a right-handed or left-handed man?

A. Right-handed.

Q. And in shoveling it is a fact that the arm which is most used is the one upon which nearly all the strain is put? A. As a rule.

Q. Haven't you in your practice, not only as a physician but in your experience as a man, seen a great many men with crippled arms who could do such work as shoveling or handling pitch-forks? Is it not a fact that about all a right-handed man does in that work with his left hand is to steady the handle? A. He has some pressure on that hand.

Q. Did you ever handle a shovel yourself?

A. Not a great deal; no.

Q. You are not familiar with it from your own experience? A. No, I am not.

Q. Then if you haven't had any experience would

(Testimony of L. V. Smith.)

you be able to say, simply from the standpoint of a physician, that a man with a crippled left arm, a lame left arm, couldn't shovel? [125—111]

A. I was only watching the action of the arm.

Q. Did you see him do any work which necessarily put a heavy strain on the left arm?

A. Well, shoveling is a pretty heavy strain on any arm.

Q. That is your conclusion?

A. That is my opinion.

Q. You couldn't say from actual experience or study of the question whether a man could not shovel with one arm that was—

A. I haven't had any actual experience with heavy shoveling and couldn't say.

Q. Did you ever see a man with half his arm gone, using a hook and doing two-handed work?

A. I can't say I have,—I don't recall any case.

Q. You say you examined this arm twice after Pedrin left the hospital? A. Yes.

Q. When was the first time you made an examination of it?

A. When I removed the splints and put it in a cast.

Q. When was that?

A. That was about, I think, forty days.

Q. After the injury?

A. I left the splints on forty days.

Q. That was about the time he went out of the hospital?

A. Yes—well, he was in the hospital back and

(Testimony of L. V. Smith.)

forth all the time.

Q. When did you take the cast off?

A. In six weeks.

Q. And did he shortly after that begin to work?

A. I don't know how soon afterwards. **[126—112]**

Q. What is the ordinary length of time it takes a fractured bone to heal in a man of his age?

A. It all depends on the bone and the physical condition of the man and the nature of the fracture.

Q. Was this a splintered fracture?

A. It was a direct break.

Q. And was he a healthy man in good physical condition at that time? A. He was.

Q. And in a man in that condition a break heals quite readily? A. It does.

Q. If there is no accident afterwards?

A. Yes, sir.

Q. And the ordinary time would be six weeks or so? A. Yes, five or six weeks.

Q. Is the bone at that time fully healed or is it liable for quite a long time afterwards to fracture?

A. No, if the position—if the bone is in that position, it is supposed to be perfect.

Q. It should be fully as strong? A. Yes.

Q. When did you next examine his arm after he had gone to work?

A. I examined it when I put on the plaster cast and when I removed the plaster cast I examined it again.

Q. I mean after that?

(Testimony of L. V. Smith.)

A. The latter part of May.

Q. Just once? A. Just once afterwards.

Q. What was its apparent condition then?

A. Well, he had perfect action—no deformity that I could see. **[127—113]** I massaged all the muscles—of course the muscles were flabby.

Q. Did you see his arm yesterday when it was bared in the courtroom?

A. Only at a distance.

Q. Did you notice the condition Doctor Boyle described and which he indicated to the jury, of a hard, heavy lump being here, just a little ways above the elbow and the arm seemed attenuated up here at the biceps muscle, so there was very little flesh between the skin and the bone?

A. I couldn't see at that distance and couldn't form any opinion from that distance.

Q. If that condition existed would it be abnormal or perfectly natural?

A. I couldn't form an opinion without an examination.

Q. Is that a normal condition of an arm, to have a hard lump just a little below the biceps muscle, above the elbow, at the point where the biceps doubles up to be thinner, smaller, with a lump further down?

Mr. BORYER.—We object to that; no such condition has been shown.

Objection overruled. Defendant allowed an exception.

A. It is not a normal condition; no.

(Testimony of L. V. Smith.)

(The plaintiff Pedrin bares his arm.)

Q. Examine that arm from the shoulder—

A. You see the action of this muscle is flex and you can extend the bone.

Q. Is that muscle and arm perfectly natural, that is, is there any displacement of the muscles?

A. There may be a stretching of this ligament here—there may **[128—114]** be a stretching of the long head of the biceps muscle.

Q. You think the action of that muscle is perfectly normal now?

A. The action of that muscle, its work, its function, is performed at present—that is my opinion.

Q. You think that he has just as much strength and the muscle is just as flexible as it was before the injury?

A. The muscle is performing the function, that is what I mean; as to the strength and power, etc., that is to be determined.

Q. You think the muscle is as flexible apparently as it was formerly?

A. The displacement may be due to the stretching of the limb.

Q. How do you account for the fact that the arm is larger here and is somewhat raised just above the elbow, how do you account for that fact,—that is not normal?

A. It may from the stretching of the long head of the biceps—doubling up on the short head; there are two attachments to the muscle, one to the shoulder joint, the other to the arm.

(Testimony of L. V. Smith.)

Q. And one of those has stretched?

A. The long head of the biceps muscle which attaches to the shoulder joint, that doubles the muscle, making the long head double on the short head—making the muscle bulge at the short head attachment.

Q. That is the cause?

A. That is the cause.

Q. That doesn't affect the use of the arm or strength at all?

A. As to the strength, I am not prepared to say, but as to the motion, the action of that muscle is not retarded in any way, as you can see—he has the action of the muscle, which is to flex and extend the arm.

Q. The normal arm, though, is fully as large here as your own **[129—115]** is and mine is?

A. Yes, it is the stretching of the ligament, in my opinion, and that doubles the two heads of the muscles upon itself, making the muscle bulge at the attachment to the short head of the biceps muscle.

Q. If the attachment in the course of stretching had been permanently weakened in some way, it would permanently affect the strength of the arm and its flexibility?

A. I don't know as to that—I don't quite get you.

Q. I say, if this stretching you speak of did displace the muscles to some extent, is there a possibility or even a probability that that would permanently weaken the arm or would impair the strength of it to some extent?

(Testimony of L. V. Smith.)

A. Well, the action of that muscle, it performs its function; as to the strength of the muscle, as you see, it is well developed. The last time I examined it, it was in a flabby condition; it is very firm now, but as to the power I couldn't give my opinion.

Q. It was about the last of May you saw him last?

A. It was about the last of May I saw him last—the muscle has developed considerably since then.

Q. Did you see him much after that?

A. I saw him around the works.

Q. What was he doing?

A. He was working there.

Q. Whereabouts on the works?

A. Well, the only place I see him was around on the dock shoveling coal and in the bunkers there. I passed him when I was going around the works—I see him out with the engineer passing as I was going down to the office. **[130—116]**

Q. Do you know when he left there?

A. The latter part of July or first of August.

Q. Now, these injuries that were shown on him when he first came to the hospital, were they painful or not? A. They were.

Q. Extremely so?

A. Well, a broken bone gives you considerable trouble and pain.

Q. You think he suffered a great deal of pain during the six weeks?

A. I didn't allow him to suffer any more than I could help.

Q. I mean the normal results of the injury, were

(Testimony of L. V. Smith.)

they such as would cause him a great deal of pain?

A. They would, without interference.

Q. That is the injuries he received were in themselves extremely painful, were they not?

A. They would be without attention.

Q. And the healing of this wound on his body, this laceration or cut, whichever you call it, and the one on his face, both of those would cause him considerable pain until they were well healed, would they not?

A. Not as much so as the break.

Q. And he was closely confined in the bed and not allowed to move much for twenty-one days?

A. Yes, sir.

Q. That is not a very comfortable position, it it?

A. No.

Q. You would say on the whole that the man did suffer a good deal of physical pain for several weeks?

Mr. BORYER.—We object to that.

By the COURT.—He may give his opinion. **[131 117]**

A. As to the suffering, I couldn't give my opinion as to that because I gave him plenty of opiates and tried to avoid that—and as to his actual suffering I couldn't give—I couldn't say.

Q. I am asking you as a medical man—doesn't a man necessarily suffer considerably from such injuries?

A. Certainly, from any break.

Witness excused.

Defendant rests.

The jury having been excused—

Mr. BORYER.—I desire to make the following motion for a directed verdict:

[Motion (in Bill of Exceptions) for a Directed Verdict.]

Comes now the defendant, the Beatson Copper Company, by its attorney, R. J. Boryer, and moves the Court to direct a verdict in favor of the defendant for the following reasons:

I.

Because the plaintiff alleges in his complaint that he is an experienced miner, capable of earning the highest wages for mining; that his evidence shows that he has followed mining for several years; that he had worked in and around the place where he was injured ever since beginning work for the defendant company and had been working in the pit or hole where the accident occurred for about two weeks, and knew the conditions surrounding the place where he was working; that he admitted he had seen the driller bore the holes and load same and heard the shots fired at the place or point where his injury happened, and which shot or shots the plaintiff claims in his complaint was the cause of the earth falling and injuring the plaintiff. **[132—118]**

II.

For the further reason that the plaintiff himself, although being an experienced miner and knowing that the shots complained of in his complaint had been fired at the place mentioned in his complaint, which caused the injury, proceeded to work without either examining or in any other manner trying to

ascertain the condition of the place where he was going to work.

III.

For the further reason that the plaintiff has failed to show or establish what relation, if any, the foreman or shift boss bore to the defendant, and the duties, responsibility and authority of said foreman or shift boss in connection with the defendant company, while the evidence does show that said foreman or shift boss was engaged in a common employment along with the plaintiff and was a fellow-servant.

IV.

For the further reason that the plaintiff has failed to show that the defendant company was negligent in any manner and has failed to establish and make out a case against this defendant.

V.

For the further reason that the defendant in its affirmative defense alleges and pleads that if the plaintiff was injured, such injuries arose from and grew out of the risks incident to his employment and which the plaintiff assumed, also pleading as an affirmative defense that if said plaintiff was injured, such injuries were due to the negligence of the plaintiff himself or by the negligence of a fellow-servant; that the plaintiff has failed, neglected and refused to deny or otherwise plead to said affirmative defenses, thereby admitting same.

After argument the motion was denied and defendant allowed an exception. **[133—119]**

Instructions of the Court.

Gentlemen of the Jury:

In this case the plaintiff alleges that he was employed by defendant as a mucker, in that portion of the mine of defendant company on Latouche Island, Alaska, known as the glory hole, an open pit or quarry; that plaintiff's duties required him to bulldoze or break up the rocks which had been blasted from the walls of said glory hole; that the rule required by safe mining and usually followed at defendant's said mine, that after a shot or blast had been fired in the walls of said glory hole that the loose rock or portions of said wall be examined and all loose fragments barred or pried loose with crowbars, in order that it might be safe for plaintiff or other workmen in a similar capacity to work in safety beneath the said wall. That about February first, 1913, while plaintiff was so working, he was injured by a mass of rock falling upon him from above, which had been negligently permitted to remain in an unsafe and loosened condition by defendant. That plaintiff had no knowledge of the unsafe condition of said wall and was exercising reasonable and ordinary care and caution for his own safety. That plaintiff sustained injuries by reason of the negligent act of the defendant as alleged in the complaint in the sum of Ten Thousand Dollars.

Defendant by way of affirmative defense alleges in his answer that if the plaintiff was injured, that said injury arose and grew out of the risks incident to plaintiff's employment, which risks the plaintiff assumed; second, that said injuries, if any, were due

to the negligence of the plaintiff himself or the negligence of a fellow-servant, for which the defendant is not responsible. [134—120]

In cases of this kind a number of questions of law arise which have been the subject of much learned disquisition, disputation and expounding.

Possibly it would be better and more satisfactory if the whole subject could be simplified, and the whole subject of negligence, contributory negligence, fellow-servant rule and assumption of risk by employee, could be submitted to juries with the instruction to decide the case by the simple rules:

Was the accident the defendant's fault?

Was the plaintiff also in fault? If so, who was most to blame?

But this Court cannot brush aside the established laws of the land and while a case like this involves much labor on the part of the Court, you as jurors must patiently try to consider the various features of the case and the instructions on the law given you by the Court.

The general rule is in cases of this kind that where a servant is employed in a mine, quarry, tunnel pit, trench or other excavation, the master owes him the duty to use ordinary and reasonable care and diligence to make his place of work as reasonably safe as the nature of the work permits of, and while the servant assumes the ordinary risks of his employment, this does not ordinarily release the master from such duty.

The jury are instructed that it is the duty of an employer to exercise reasonable care to furnish em-

ployees with a reasonably safe place to work and with reasonably safe and suitable tools and appliances, and if he fails in any of these particulars, then he is guilty of actionable negligence. What constitutes [135—121] a safe place to work and safe appliances varies, to some extent, with the nature of the employment, and each case is to be decided within the general rules of law upon its own peculiar facts.

The duty of the master to furnish safe places for employees to work in and safe appliances to work with is a continuing one, to be exercised wherever circumstances require it.

The jury are instructed that it was incumbent upon the plaintiff to use reasonable and ordinary care and caution to observe open and obvious defects and dangers and such as would be disclosed by the exercise of ordinary care, but that he had the right to assume that the defendant had used due care to furnish him with a reasonably safe and suitable place for work.

DEFINITIONS:

"Negligence." Negligence consists in the failure to observe that degree of care which the law requires for the protection of the interests likely to be injuriously affected by the want of it.

The law makes distinctions in the degrees of negligence or want of care, but in this case you are instructed that the degree of care the defendant owed the plaintiff in providing him with a safe place in which to work, as explained to you in these instructions, was reasonable care—that is, such a de-

gree of care as an ordinarily reasonable and prudent man would have exercised under similar circumstances.

Contributory negligence means the want of care or prudence on the part of the person injured which is the efficient or proximate cause of the injury, and the law enjoins upon every [136—122] person the duty to exercise a reasonable care and prudence to avoid dangers which are patent and obvious or which such person knew of or could by the exercise or reasonable care and diligence have known.

Fellow-Servant:

The Court instructs the jury that in order to constitute servants of the same master fellow-servants, it is essential that they should be at the time of the injury directly co-operating with each other in the particular business in hand or that their duties shall bring them into habitual association, so that they may exercise an influence upon each other promotive of proper caution.

You are further instructed that if you believe from a preponderance of evidence that the defendant was guilty of negligence, as alleged in the plaintiff's complaint, and the plaintiff, by reason thereof, was injured and damaged as claimed by him, and that he himself was guilty of no want or ordinary care that contributed to the injury, then the defendant is liable in this action, although you may further believe from the evidence that the negligence of a fellow-servant contributed to such injury.

Vice-principal:

You are instructed that when an injury results to

a servant from an order improperly given or act negligently done, and the person who gives the order or does the act is in the performance of a duty, the breach of which by the master in person would create a liablity, and he is clothed with apparent authority in that respect, and the order given or act done is within the [137—123] scope of the apparent authority, the master is responsible in damages to the injured servant, if the injured servant is in the exercise of due care and caution for his own safety. It is immaterial whether the person exercising the authority was known as a foreman of by any other title; if he is clothed with apparent authority to direct and command, and the injured servant in good faith obeys and performs, the person so exercising such authority is not as to the person injured a fellow-servant in the sense that the common master is relieved of responsibility for injuries resulting from his imprudent conduct or negligent act.

The rule of law known as the fellow-servant rule has no application to this case unless you find that the plaintiff was injured through the negligence of a fellow-workman not in authority over him. If you find that there was negligence on the part of another employee of the company and the negligent person had charge of the work in the glory hole and control over the men working there, he was not a fellow-servant but what is known in law as a vice-principal. Any duty which the master is bound to perform for the safety of his servants he cannot escape responsibility for by delegating the performance to a subordinate. The duty of providing a safe place to work

cannot be shifted by the master, and the agent representing the master in the premises must perform that duty and if he fails through negligence, the negligence is that of the master.

Assumption of risk is a rule of law which imposes upon an employee risk of the ordinary dangers of his employment. That is, the dangers necessarily attendant upon the employment and hazard of accidents which may occur in course of its employment [138—124] after all reasonable safeguards for the prevention of accidents have been adopted. The employee who accepts service in a dangerous employment assumes the risk of accidents which may occur notwithstanding the usual and approved safeguards have been taken to avoid them. But if the employer fails to adopt reasonable precautions to prevent accidents by exercising care corresponding to the hazards of the business, by providing a safe place to work and safe appliances and tools, he is liable to resulting injury to employees if his negligence is the direct and immediate cause of the injury or is an efficient cause in its occurrence. The law of contributory negligence, which fixes the blame upon an employee for an accident resulting in his injury, where the failure on his part contributes to the mishap, does not excuse the employer, if the accident could not have happened or the injury resulted but for the conditions arising from the employer's negligence. [Pltff.]

Certain duties are said to be nondelegable. By this is meant that such duties are personal to the master and he cannot delegate them to a servant and

then escape liability if the servant fails to perform or negligently performs the duty, on the ground that the negligent servant was a fellow-servant of the injured servant. The rule is that if a duty is personal to the master, the one to whom he intrusts the performance of this duty is called a vice-principal and the master is liable for his negligence in relation to such duties. [Pltff.] [139—125]

A servant is not guilty of contributory negligence when he is injured by an accident which could not happen in the ordinary course of the employment in which he is engaged, if the master had taken reasonable care to avoid the accident or to prevent the conditions which made it possible, even though its possibility is known to the servant, because he has a right to rely upon the belief that the master will not allow needlessly unsafe conditions to exist. [Pltff.]

You are instructed that before the plaintiff can recover in this action, it is necessary for him to prove by a preponderance of the evidence not only that the master was negligent, but also that his negligence was the cause of the injuries to the plaintiff, and this obligation is not discharged by merely showing the existence of a defect or the happening of the accident or injury. [Defendant's instructions given.]

You are instructed that the plaintiff alleges in his complaint that he is a miner by occupation, at which employment he was able to earn, and when opportunity offered did receive, the highest going wages as a miner, therefore you are instructed that the plaintiff assumes all patent and obvious risks of his employment which he has sufficient intelligence to

understand and appreciate, and knew of the danger of working under such conditions. [Defendant's instructions given.]

You are instructed that before you can find that shift boss or foreman Green was a vice-principal and that it was his duty as such foreman to provide a reasonably safe place for the men under his direction to work and to see and provide after a shot was fired in the wall of the glory hole no loosened fragments [140—126] were allowed to remain upon the wall from which they might without warning be detached, it is necessary that you first find from the evidence introduced by the plaintiff that the defendant corporation intrusted this duty upon this foreman, and unless you find from the evidence that the defendant corporation did delegate to shift boss or foreman Green the duty of providing the place for work for the plaintiff and require of him to provide that after a shot was fired in the wall of the glory hole no loosened fragments were allowed to remain on the wall, you are instructed the plaintiff cannot recover in this action by reason of any negligence of shift boss or foreman Green. [Defendant's instructions given.]

You are instructed that it being the duty of the master to furnish a reasonably safe place and safe tools and appliances to work with, as explained in these instructions, it was the duty of the defendant in this case to keep the walls of the pit where plaintiff was working, in a reasonably safe condition, so far as the nature of the work permitted, and this duty could be performed in a case like that where the defendant is a corporation, only by hiring and

instructing some person or persons to attend to this duty, and if you believe from the evidence that the plaintiff himself had been instructed in this regard, and had been told by his employer that it was a part of his work and duty to personally see that the walls were free from loose, hanging rock, before going to work near or under such walls, to "bar them down," and the plaintiff negligently and without using reasonable and ordinary care failed to perform this duty, then he was guilty of contributory negligence which was the direct and proximate cause of his own injury, and he cannot recover in [141—127] this case, and your verdict should be for the defendant.

If, however, you believe from the evidence that this duty was by the defendant company imposed upon the foreman Green, or any other employee of the defendant company than plaintiff, and the plaintiff knew this, then the plaintiff had a right to assume that such duty had been performed by such person so instructed, and he would not be guilty of such contributory negligence as would prevent his recovery, unless he knew the wall was at the time of his injury in an unsafe and dangerous condition, and he disregarded such danger and failed to use reasonable care and unnecessarily exposed himself to such danger, or unless the danger from loose, hanging rock was so obvious and patent that the plaintiff, by the use of reasonable and ordinary care, could and should have observed it.

You are further instructed that before the plaintiff can recover damages from the defendant, he must establish by a preponderance of the evidence all of the material allegations of his complaint, and must

so establish that the loose rock which fell upon and injured him was loosened by blasting shortly before the injury occurred, and that the defendant was guilty of negligence which was the direct cause of the injury to plaintiff in not taking reasonable precautions to have the walls of said pit or glory hole examined, after such blasting, and so render the place where plaintiff was working reasonably safe, as explained to you in these instructions.

On the question of damages you are instructed that if you find by a preponderance of the evidence that the allegations of [142—128] the plaintiff's complaint are true and that the plaintiff was injured by the negligence of the defendant and while exercising reasonable and ordinary care for his own safety, as explained to you in these instructions, you will then consider the question of the damages which the plaintiff is entitled to recover, and in considering this, you may consider the nature and degree of the injuries received by plaintiff, whether or not they are permanent and prevent the plaintiff from following his occupation, to wit, that of a miner; his physical condition and age at the time of the accident; the wages he was able to earn; the suffering caused him by such injuries and his expectancy or probable length of life; and also the loss to him by his inability to earn a living by being able to follow his said vocation, if you find by reason of such injuries that he is unable so to do.

In this case your verdict should be in accordance with the preponderance of the evidence; that is to say, a person who affirmatively alleges a thing has the burden of proof as to that particular thing and

must prove the same by a preponderance of the evidence. And in this case it is incumbent upon the plaintiff to establish by a preponderance of the evidence all of the affirmative allegations of his complaint; and it is incumbent upon the defendant to establish by a preponderance of the evidence all the affirmative allegations set up in its answer.

The preponderance of the evidence means the weight of the evidence and if the scales are equally balanced between the parties on any question at issue, you should determine that question or issue against the one having the affirmative of that particular question or issue. [143—129]

The jury are instructed that the burden of proof is upon the plaintiff to establish by a preponderance of the evidence that the defendant was negligent in not providing a safe and suitable place for the plaintiff to work in, as explained to you in these instructions; that in consequence of such negligence plaintiff received the injuries complained of in the manner and form alleged in the complaint, and while the plaintiff was in the exercise of ordinary care and caution for his own safety.

You are the exclusive judges of the credibility of the witnesses and of the effect and value of their testimony. But your power of judging the effect of evidence is not arbitrary but to be exercised with legal discretion and in subordination to the rules of evidence, as given to you in these instructions.

You are not bound to find in conformity with the declarations of any number of witnesses, which do not produce conviction in your minds against a less number or against a presumption or other evidence

satisfying to your minds.

If a witness testifies falsely in one part of his evidence, you may distrust him in any other parts of his evidence, but you should give effect to such parts as you believe and disregard the parts you believe to be false.

In judging of the credibility of the witnesses you should consider the appearance of the witness upon the stand; his apparent candor and inclination to tell the truth or otherwise; the probability of his story; the opportunity he had of seeing or knowing the things about which he testified and also the interest, [144—130] if any, such witness has in the result of the case.

You are instructed that the evidence is to be estimated not only by its own intrinsic weight, but also according to the testimony which it is within the power of one side to produce and of the other side to contradict; and, therefore, if the weaker and less satisfying evidence is produced when it appears that it was within the power of the party offering the same to produce stronger and more satisfying evidence, such evidence, if so offered, should be viewed with distrust.

It is your duty to accept the law of this case as given to you in these instructions, and if the Court should be in error as to any question of law upon which you are instructed, the party aggrieved has his remedy by having the case reviewed by the appellate court. You should take and construe these instructions as a whole, and not simply pick out certain portions of them.

You should not be moved by any influence of sym-

pathy, prejudice or passion, fear or favor, but aim solely at determining the truth of this matter from the evidence and the law as given you by the Court.

In considering your verdict you should listen to the reasons and arguments of each other in a reasonable and fair state of mind and not assume an attitude of stubbornness and unwillingness to listen with an open mind to the arguments and reasons of your fellow-jurors. **[145—131]**

You will take with you to your jury-room the pleadings in the case, as well as these instructions, for your guidance.

I also hand you two forms of verdict, the first one finding for the plaintiff and against the defendant, with a blank space which you will fill in with the amount of damages you find for the plaintiff, in case you should so find; and, second, a verdict in favor of the defendant and against the plaintiff on all the issues.

FRED M. BROWN,
District Judge. **[146—132]**

[Official Stenographer's Certificate to Transcript of Testimony.]

I do hereby certify that I am the official court stenographer for the Third Judicial Division, Territory of Alaska; that as such official stenographer I reported the proceedings in the trial of the above-entitled cause, to wit, John Pedrin versus Beatson Copper Company, a Corporation; that the above is a full, true and correct transcript of the shorthand notes taken by me at said trial.

Dated, Valdez, Alaska, December 6, 1913.

ISAAC HAMBURGER. **[147]**

In the District Court for the Territory of Alaska, Third Division.

No. 633.

JOHN PEDRIN,

Plaintiff,

vs.

THE BEATSON COPPER COMPANY, a Corporation,

Defendant.

Certificate to Bill of Exceptions.

I, Fred M. Brown, Judge of the above-entitled court, do hereby certify that the above and foregoing Bill of Exceptions in the above-entitled cause is a true bill of exceptions, and the same has been approved, allowed and settled, and ordered filed and made a part of the record of said cause.

Done in open court this the 17 day of December, A. D. 1913.

FRED M. BROWN,
Judge.

Filed in the District Court, Territory of Alaska, Third Division. Dec. 17, 1913. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. [148]

In the District Court for the Territory of Alaska, Third Division.

No. 633.

JOHN PEDRIN,

Plaintiff,

vs.

THE BEATSON COPPER COMPANY, a Corporation,

Defendant.

Instructions Requested by Defendant.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Nov. 11, 1913. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. [149]

DEFENDANT'S REQUESTED INSTRUCTIONS.

No. I of Defendant's Instructions Accepted by Judge and Presented With His Instructions to Jury. [150]

You are instructed that the plaintiff bases his cause of action upon the defendant's negligence in that the plaintiff claims that the defendant negligently, recklessly and wantonly failed and neglected to make sufficient examination of the wall in the glory hole where the plaintiff was working after shots had been fired in said glory hole and to bar down all loose rock and earth adhering to said wall, or to remove from the wall all loose portions unsettled by the shots mentioned in the complaint. You are instructed that before the plaintiff can recover in this action it will be necessary for him to prove by the preponderance of the evidence that the defendant did not make sufficient examination of the wall complained of in the complaint, from which the rock and earth had been detached, and prove that at or before the time he entered this place to perform his work that there was loose rock and earth adhering to the wall, and must further prove that the defendant failed to remove from the wall all loose portions unsettled by the shots mentioned in the complaint and still adher-

ing to the wall, and unless the plaintiff establishes these facts by the preponderance of the evidence, you are instructed he cannot recover in this action.

Refused.

II. [151]

You are instructed that before the plaintiff can recover in this action he must show that he exercised ordinary and reasonable care, that is, such care as an ordinary, prudent person would exercise under the same circumstances, the degree of care which must be taken by the plaintiff must be adjusted to the character of the work and it should be commensurate with the dangers of the employment.

Refused—Covered by Other Instructions.

III. [152]

You are instructed that if you find from the evidence there was a rule in existence at the defendant's mine requiring all workmen to examine the place or places where they were working to see that such places were safe to work in and about, you are then instructed that the law presumes this rule was known to the plaintiff at the time he was injured and when he entered the place where he was injured.

Refused.

IV. [153]

You are instructed that if it was the duty of the plaintiff to make safe or assist in making safe the place where he was working as the work progressed,

then the plaintiff cannot recover in this action.

Refused.

V. [154]

You are instructed that if it was the duty of the plaintiff to assist and help to bar down the loose earth, gravel and rock that caused his injury and he failed to do so, the plaintiff cannot recover in this action.

Refused.

VI. [155]

You are instructed that it was the duty of the plaintiff in this case to exercise that degree of care commensurate with the character of his occupation, which a reasonably prudent person would employ under like circumstances in order to protect himself from injury; and, if he fails to exercise this care, he cannot recover of the defendant for an injury to which his own negligence has contributed, even though the defendant has failed to exercise due care on his part. The plaintiff cannot recklessly expose himself to known danger, or to a danger which an ordinary prudent and intelligent man would, in his situation, have known, and then recover of the master for an injury his own recklessness has caused.

Refused.

VII. [156]

You are instructed that the plaintiff alleges in his complaint that he was a miner and capable of earning the highest going wages paid to miners when opportunity offered, therefore he cannot recover for

his injuries if same were caused by his inattention to his surroundings and failure to take due precautions against known or obvious dangers.

Refused.

VIII. [157]

You are instructed that if it was the duty of the plaintiff in this action to inspect the place where he was working to see if it was safe to work at the place or point where he was working, and he failed to make this inspection, you are instructed he cannot recover in this action.

Refused.

IX. [158]

You are instructed that if the plaintiff knew, or if the dangers connected with the work were so patent and obvious that he either knew, or in the exercise of ordinary care should have known of their existence, he assumes the risk of injury from the dangers and defects of which he complains of in his complaint.

Refused.

X. [159]

You are instructed that the plaintiff assumed the risk incident to his employment although he did not have absolute knowledge of the risks, if they were such that an ordinary, prudent man, under the circumstances would, by reasonable diligence, have discovered them.

Refused.

XI. [160]

You are instructed that where a miner or experienced servant voluntarily places himself in a position of danger not called for by the nature of his employment, he is guilty of contributory negligence and cannot recover.

Refused.

XII. [161]

You are instructed that if the plaintiff had actual or constructive knowledge of the dangers or unsafe condition of the place and he failed to take such precautions as a reasonably prudent man under similar circumstances would exercise to avoid the dangers, and is injured by reason of his failure to use such ordinary care, he is guilty of contributory negligence and cannot recover in this action.

Refused.

XIII. [162]

You are instructed that if the plaintiff continued work with knowledge actual or constructive of the dangers regarding the place where he was working, where an ordinary prudent man would not work or subject himself to, he is guilty of contributory negligence and cannot recover in this action.

Refused.

XIV. [163]

You are instructed that all persons who serve the same master, work under the same control, deriving authority and compensation from the same source and are engaged in the same general business, al-

though it may be in different grades or departments of it, are fellow-servants.

Covered by other instructions.

XVI. [164]

You are instructed that if the defendant by any of its agents or servants, carefully examined the glory hole after the shots alleged in the complaint were fired and the person or persons making this examination thought or pronounced it safe, and such person or persons were coworkers and fellow-servants of the plaintiff, you are instructed the plaintiff cannot recover in this action.

Refused.

XVII. [165]

You are instructed that the plaintiff alleges in his complaint that "he is a miner by occupation, at which employment he was able to earn when opportunity offered, and had earned and received, the highest wages as a miner." This allegation you must consider as true as there has been no evidence offered by the defendant to contradict this allegation. Therefore, if you find from the evidence that the plaintiff prior to receiving the injuries complained of had knowledge, or from his experience and knowledge imputed to him as a miner, had knowledge of facts such as would lead a man of his experience and knowledge to believe that there was danger of injury from falling rocks and earth at the place where the injury occurred, and with such knowledge he continued to work without notifying the proper officers

of the defendant company of such danger and while continuing to work at this place received the injury complained of, then, in that case, you are instructed the plaintiff cannot recover in this action.

Refused.

XVIII. [166]

You are instructed that before you can find for the plaintiff, the plaintiff must show that the defendant failed or neglected to make an examination of the place complained of in the complaint as being dangerous and which caused the plaintiff's injuries.

Refused.

XIX. [167]

You are instructed that if you find from the evidence that it was the duty of the plaintiff and his fellow-workmen to make safe the place of work as it progressed and to bar down all loosened rock and earth after shots had been fired, the master's or defendant's duty is fulfilled when he furnishes them with suitable material and implements for doing this work, and if the plaintiff or any or his fellow-servants failed or neglected to make the place safe, or failed to bar down the loose earth and gravel which caused the plaintiff's injury, he cannot recover in this action.

Refused—Covered in other instructions.

XXI. [168]

XXII.

You are instructed that the plaintiff in this case has introduced in evidence that by the rules of the

defendant company it was the duty of the plaintiff along with the other men working with him to assist in and bar down the loose rock, earth and gravel left after the shots had been fired, the plaintiff having introduced this in evidence he is bound by it where there is no evidence to the contrary, therefore you are instructed if this rule made it the duty of the plaintiff to assist in and bar down the loose rock, earth and gravel that fell and injured him and he failed, neglected or refused to do so and was injured by reason of said earth, rock and gravel falling down and striking him, you are instructed he cannot recover in this case.

Refused—Covered in other instructions.

XXIII. [169]

You are instructed that the plaintiff failed to introduce in evidence what if any power or authority the shift boss or foreman Green had, or what authority or power or what duties the defendant company had entrusted to him, or that he had authority or right to give any order or command which violated any rule of the company or prevented any rule of the company being carried out, or that he had authority or it was his duty to see or do anything regarding the safety of the place where the men were working; therefore, you are instructed that if the rules of the defendant company required the plaintiff, along with the other men working with him, to assist in and bar down the loose earth, rock and gravel left after the shots had been fired, you are instructed that it was the duty of the plaintiff to assist in and bar down the loose earth, rock and

gravel that afterwards fell and struck him causing the injury, and this is true although the shift boss or foreman Green instructed him to start bulldozing, and if he failed or neglected to bar down the loose rock earth and gravel that struck him, he cannot recover in this action.

Refused.

XXIII. [170]

XXIV.

You are instructed that the plaintiff has failed to introduce or show in evidence that the shift boss or foreman Green advised or told the plaintiff that he need not bar down the loose rock and earth that the plaintiff claims struck him or that anyone else told him this or informed him that the shift boss or foreman Green had said not to bar down the loose rock and gravel that struck the plaintiff, therefore you are instructed that if the rule of the company required that he do or assist in barring down this earth, you are instructed that it was the duty of the plaintiff to do so, although the foreman had advised him to begin bulldozing, and if he failed to bar down said earth, rock and gravel and was injured by reason of said earth, rock and gravel not being barred down, you are instructed he cannot recover in this action.

Refused.

XXIV. [171]

XXV.

You are instructed that no evidence was introduced showing that the earth which struck the plain-

tiff causing the injury was earth or rock that had been loosened by the shots that had been fired at the times alleged in the complaint to have been fired or that the earth and rock which struck the plaintiff was earth and rock that should have been barred down or looked after by the defendant, and before you can find for the plaintiff in this case it is necessary that he prove that the earth and rock which struck him was earth and rock that had been loosened by the shots complained of in the complaint and that should have been barred down, and unless you so find from the evidence introduced in this case, you are instructed the plaintiff cannot recover.

Refused—Covered in other instructions.

XXV. [172]

In the District Court for the Territory of Alaska, Third Division.

No. 633.

JOHN PEDRIN,

vs.

BEATSON COPPER COMPANY, a Corporation.

Verdict.

We, the jury duly empaneled and sworn in the above-entitled action, do find for the plaintiff and assess his damages at the sum of $4,000.00.

J. J. MILLER,
Foreman.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Nov. 11, 1913. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

Entered Court Journal No. 7, page 452. [173]

In the District Court for the Territory of Alaska, Third Division.

No. 633.

JOHN PEDRIN,

Plaintiff.

vs.

THE BEATSON COPPER COMPANY, a Corporation,

Defendant.

Judgment.

This cause came on for trial on the 11th day of November, A. D. 1913, at the Special October, 1913, term of the above-entitled court, the plaintiff appearing in person and by his counsel, E. E. Ritchie, and the defendant appearing by its counsel, R. J. Boryer, and a jury of twelve men was duly selected, impaneled and sworn to try the cause. The parties introduced their evidence and rested and after arguments by counsel and instructions by the Court, the jury retired on the 12th day of November, A. D. 1913, to consider of their verdict. Thereafter, on the same day, the jury returned into court with their verdict, whereby they found for the plaintiff and against the defendant and assessed plaintiff's damages at $4,000.00.

On the 13th day of November, A. D. 1913, the defendant filed a motion for judgment notwithstanding their verdict and a motion for a new trial, which motions were on the same day argued by counsel and each of them by the Court denied, to which rul-

ings of the Court defendant by its counsel then and there excepted.

WHEREFORE by reason of the law and the premises hereinbefore recited,

IT IS ORDERED AND ADJUDGED by the Court that **[174]** the said plaintiff do have and recover from the defendant the sum of Four Thousand Dollars ($4,000.00) and his costs in this action, taxed at $64.00.

Dated at Valdez, Alaska, this 14th day of November, A. D. 1913.

FRED M. BROWN,
District Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Nov. 14, 1913. Arthur Lang, Clerk. By K. L. Monahan, Deputy.

Entered Court Journal No. 7, page No. 464. **[175]**

In the District Court for the Territory of Alaska, Third Division.

No. 633.

JOHN PEDRIN,

Plaintiff,

vs.

THE BEATSON COPPER COMPANY, a Corporation,

Defendant.

Defendant's Exceptions to Court's Instructions to Jury.

This cause having come on to be heard on the 10th day of November, 1913, and having been submitted

to jury on the 11th day of November of same year, and it having been stipulated between the attorneys for plaintiff and defendant in the presence of the jury before it had retired and in the presence of the Court that the plaintiff and defendant have until the 16th day of November, 1913, to make and take exceptions to instructions given and refused and to the trial of said cause,—

Now, on this the 14th day of November, 1913, the defendant makes the following exceptions:

I.

Defendant excepts to instructions given on page 8, for the reason that said instructions are not the proper and correct test or rule to determine who are fellow-servants and master's liability and are contrary to law; said instructions are as follows:

"FELLOW-SERVANT.

"The Court instructs the jury that in order **[176]** to constitute servants of the same master fellow-servants it is esential that they should be at the time of the injury directly co-operating with each other in the particular business in hand or that their duties shall bring them into habitual association, so that they may exercise an influence upon each other promotive of proper caution.

"You are further instructed that if you believe from a preponderance of evidence that the defendant was guilty of negligence, as alleged in the plaintiff's complaint, and the plaintiff by reason thereof was injured and damaged as claimed by him, and that he himself was guilty of no want of ordinary care that contributed to the injury, then the defend-

ant is liable in this action, although you may further believe from the evidence that the negligence of a fellow-servant contributed to such injury."

II.

Defendant excepts to instruction given on page 9, for the reason that said instruction only requires the servant to have apparent authority in order to bind the master for some negligent act of the servant done regarding the positive duties of the master and that are lodged in the master to do or delegate and is contrary to law; said instruction is as follows:

"VICE-PRINCIPAL.

"You are instructed that when an injury results to a servant from an order improperly given or act negligently done, and the person who gives the order or does the act is in the performance of a duty, the breach of which by the master in person would create a liability, and he is clothed **[177]** with apparent authority in that respect, and the order given or act done is within the scope of the apparent authority, the master is responsible in damages to the injured servant, if the injured servant is in the exercise of due care and caution for his own safety. It is immaterial whether the person exercising the authority was known as a foreman or by any other title; if he is clothed with apparent authority to direct and command, and the injured servant in good faith obeys and performs, the person so exercising such authority is not as to the person injured a fellow-servant in the sense that the common master is relieved of responsibility for injuries resulting from his imprudent conduct or negligent act.

II Brickwood—Sackett 1439."

III.

Defendant excepts to instruction given on page 10, for the reason that said instruction is erroneous and contrary to law in that it states that employees cannot be fellow-servants with other employees who are in authority over them, which instruction is as follows:

"The rule of law known as the fellow-servant rule has no application to this case unless you find that the plaintiff was injured through the negligence of a fellow-workman not in authority over him. If you find that there was negligence on the part of another employee of the company and the negligent person had charge of the work in the glory hole and control over the men working there, he was not a fellow-servant but what is known in law as a vice-principal. Any duty which the master is bound to perform for the safety of his servants he cannot escape [178] responsibility for by delegating the performance to a subordinate. The duty of providing a safe place to work cannot be shifted by the master and the agent representing the master in the premises must perform that duty, and if he fails through negligence, the negligence is that of the master."

IV.

Defendant excepts to instruction given on page 11, for the reason that said instruction is contrary to law in that it requires the master to furnish a safe place to work which instruction is as follows:

"Assumption of risk is a rule of law which imposes upon an employee risk of the ordinary dangers

of his employment. That is, the dangers necessarily attendant upon the employment and hazard of accidents which may occur in course of its employment after all reasonable safeguards for the prevention of accidents have been adopted. The employee who accepts service in a dangerous employment assumes the risk of accidents which may occur notwithstanding the usual and approved safeguards have been taken to avoid them. But if the employer fails to adopt reasonable precautions to prevent accidents by exercising care corresponding to the hazards of the business, by providing a safe place to work and safe appliances and tools, he is liable to resulting injury to employees if his negligence is the direct and immediate cause of the injury or is an efficient cause in its occurrence. The law of contributory negligence, which fixes the blame upon an employee for an accident resulting in his injury, where the failure on his part contributes to the mishap, does not excuse the employer, if the accident could not have happened or the injury resulted but for the [179] conditions arising from the employer's negligence."

V.

Defendant excepts to instruction given on page 12, for the reason that it informed the jury that certain duties of the master are nondelegable and the master cannot escape them if delegated to a servant, but said instruction does not inform the jury what duties can and what duties cannot be delegated and also informed them that if the defendant in this case delegated one of said nondelegable duties to two men

who were fellow-servants and one of them was injured by reason of the carelessness of the other, the one could recover, said instruction is as follows:

"Certain duties are said to be nondelegable. By this is meant that such duties are personal to the master and he cannot delegate then to a servant and then escape liability if the servant fails to perform or negligently performs the duty, on the ground that the negligent servant was a fellow-servant of the injured servant. The rule is that if a duty is personal to the master the one to whom he intrusts the performance of this duty is called a vice-principal and the master is liable for his negligence in relation to such duties."

VI.

Defendant excepts to instruction given on page 13, for the reason that it relieves the servant of the responsibility of using the care required by law of him, said instruction is as follows:

"A servant is not guilty of contributory negligence when he is injured by an accident which could not happen in the ordinary course of the employment in which he is engaged, if the master had taken reasonable care [180] to avoid the accident or to prevent the conditions which made it possible, even though its possibility is known to the servant, because he has a right to rely upon the belief that the master will not allow needlessly unsafe conditions to exist."

VII.

Defendant excepts to instruction given on page 16, for the reason that no evidence was introduced showing plaintiff's expectancy or probable length of life,

which instruction is as follows:

"On the question of damages you are instructed that if you find by a preponderance of the evidence that the allegations of the plaintiff's complaint are true and that the plaintiff was injured by the negligence of the defendant and while exercising reasonable and ordinary care for his own safety, as explained to you in these instructions, you will then consider the question of the damages which the plaintiff is entitled to recover, and in considering this, you may consider the nature and degree of the injuries received by plaintiff, whether or not they are permanent and prevent the plaintiff from following his occupation, to wit, that of a miner; his physical condition and age at the time of the accident; the wages he was able to earn; the suffering caused him by such injuries and his expectancy or probable length of life; and also the loss to him by his inability to earn a living by being able to follow his said vocation, if you find by reason of such injuries that he is unable so to do." [181]

VIII.

Defendant excepts to instruction given on page 17, for the reason that said instruction required the defendant to prove by the preponderance of the evidence its affirmative defenses set up in its answer and not denied or replied to by the plaintiff, which instruction is as follows:

"In this case your verdict should be in accordance with the preponderance of the evidence; that is to say, a person who affirmatively alleges a thing has the burden of proof as to that particular thing and

must prove the same by a preponderance of the evidence; and in this case it is incumbent upon the plaintiff to establish by a preponderance of the evidence all of the affirmative allegations of his complaint; and it is incumbent upon the defendant to establish by a preponderance of the evidence all of the affirmative allegations set up in its answer.

"The preponderance of the evidence means the weight of the evidence and if the scales are equally balanced between the parties on any question at issue; you should determine that question or issue against the one having the affirmative of that particular question or issue."

IX.

Defendant excepts to refusal of Court to give instruction No. 2 requested by defendant.

X.

Defendant excepts to refusal of Court to give instruction No. 3 requested by defendant.

XI.

Defendant excepts to refusal of Court to give [182] instruction No. 4 requested by defendant.

XII.

Defendant excepts to refusal of Court to give in struction No. 5 requested by defendant.

XIII.

Defendant excepts to refusal of Court to give instruction No. 6 requested by defendant.

XIV.

Defendant excepts to refusal of Court to give instruction No. 7 requested by defendant.

XV.

Defendant excepts to refusal of Court to give instruction No. 8 requested by defendant.

XVI.

Defendant excepts to refusal of Court to give instruction No. 9 requested by defendant.

XVII.

Defendant excepts to refusal of Court to give instruction No. 10 requested by defendant.

XVIII.

Defendant excepts to refusal of Court to give instruction No. 11 requested by defendant.

XIX.

Defendant excepts to refusal of Court to give instruction No. 12 requested by defendant.

XX.

Defendant excepts to refusal of Court to give instruction No. 13 requested by defendant.

XXI.

Defendant excepts to refusal of Court to give instruction No. 14 requested by defendant. [183]

XXII.

Defendant excepts to refusal of Court to give instruction No. 16 requested by defendant.

XXIII.

Defendant excepts to refusal of Court to give instruction No. 17 requested by defendant.

XXIV.

Defendant excepts to refusal of Court to give instruction No. 18 requested by defendant.

XXV.

Defendant excepts to refusal of Court to give in-

struction No. 19 requested by defendant.

XXVI.

Defendant excepts to refusal of Court to give instruction No. 21 requested by defendant.

XXVIII.

Defendant excepts to refusal of Court to give instruction No. 22 requested by defendant.

XXIX.

Defendant excepts to refusal of Court to give instruction No. 23 requested by defendant.

XXX.

Defendant excepts to refusal of Court to give instruction No. 24 requested by defendant.

XXXI.

Defendant excepts to refusal of Court to give instruction No. 25 requested by defendant.

R. J. BORYER,
Attorney for Defendant.

Exceptions allowed.

FRED M. BROWN,
Judge.

Filed in the District Court, Territory of Alaska, Third Division. Nov. 14, 1913. Arthur Lang, Clerk. By Chas. H. Hand, Deputy. [184]

In the District Court for the Territory of Alaska, Third Division.

No. 633.

JOHN PEDRIN,

Plaintiff,

vs.

THE BEATSON COPPER COMPANY, a Corporation,

Defendant.

Motion for Judgment for Defendant Notwithstanding Judgment for Plaintiff.

Defendant, by its attorney, moves the Court to enter judgment in favor of the defendant and against the plaintiff, notwithstanding the verdict returned in the case, for the following reasons:

1.

Insufficiency of evidence to sustain or justify the verdict in the following particulars:

a. The jury was not justified in finding the defendant guilty of any negligence as alleged by the plaintiff, nor in finding against said defendant.

b. That the plaintiff alleged in his complaint that his regular occupation is that of a miner, at which employment he was able to earn and had earned and received the highest going wages as a miner; that while employed as a mucker for defendant in its mine, in a glory hole, he was struck by some earth and rock that fell from the side of a bank that had been loosened by a dynamite charge and that had not been barred down; that the recognized rules of careful and safe mining require that said walls

be barred down and that duty devolves upon the mine operator and his vice-principal, the foreman or the shift boss directing the work.

The evidence introduced by the plaintiff shows that: [185] The plaintiff was an experienced miner. That he had been working in the glory hole for two weeks; knew that the shots had been fired just prior to going to dinner. That he returned immediately after dinner and resumed work under or near the place where the shot or shots had been fired, and did so without making an examination and without taking any precautions whatever, and against the evidence introduced by him in not barring down the loose earth that he complained of, although he and the other witnesses who were called by the plaintiff testified that it was his duty to bar down the loose earth.

Plaintiff claims he resumed work after dinner, bulldozing rock, by reason of the orders of shift boss or foreman Green. No evidence was introduced that this shift boss or foreman had been instructed or empowered to do any of the positive duties required of the defendant; no evidence was introduced connecting the earth that struck plaintiff with that loosened by the shots complained of or connected with the work.

That the verdict is against the law and evidence.

WHEREFORE defendant prays for judgment notwithstanding the verdict.

R. J. BORYER,
Attorney for Defendant.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Nov. 13, 1913. Arthur Lang, Clerk. By K. L. Monahan, Deputy. [186]

In the District Court for the Territory of Alaska, Third Division.

No. 633.

JOHN PEDRIN,

Plaintiff,

vs.

THE BEATSON COPPER COMPANY, a Corporation,

Defendant.

Order Overruling Motion for Judgment for Defendant Notwithstanding Judgment for Plaintiff.

Defendant's motion for judgment in favor of the defendant notwithstanding judgment returned by jury in favor of plaintiff having come on to be heard on the 13th day of November, 1913, the same having been argued by attorneys for plaintiff and defendant, and having been duly considered by the Court,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that said motion be and the same is hereby denied, to which defendant excepts and exception is allowed.

Done this the 14th day of November, A. D. 1913.

FRED M. BROWN,

Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Nov. 14, 1913. Arthur Lang, Clerk. By Chas. A. Hand, Deputy.

Entered Court Journal No. 7, page No. 465. [187]

In the District Court for the Territory of Alaska, Third Division.

No. 633.

JOHN PEDRIN,

Plaintiff,

vs.

THE BEATSON COPPER COMPANY, a Corporation,

Defendant.

Motion for New Trial.

Comes now the defendant by its attorney and moves the Court that if it denies its motion for judgment in favor of defendant notwithstanding verdict in favor of the plaintiff, that the Court vacate the verdict found by the jury in this action and grant the defendant a new trial in this action for the following reasons which materially affect its substantial rights, to wit:

I.

Insufficiency of evidence to sustain or justify the verdict in the following particulars:

(a) That the jury was not justified in finding defendant guilty of any negligence as alleged by the plaintiff nor in finding against said defendant.

(b) That the plaintiff based his cause of action upon the following facts: That on or about February 1st, 1913, plaintiff while employed by defendant

company was at work in glory hole of defendant's mine; that he went to dinner about 11:30 P. M. and returned to work about 12:30 A. M.; that after quitting work to go to dinner at 11:30 P. M. a shot was fired in the glory hole which further loosened some rock, gravel, and earth that had been loosened prior to his [188] going to work at 7 P. M. of that day; that when he returned from dinner about 12:30 A. M. he was ordered by the shift boss or foreman to resume immediately his work of bulldozing at the bottom of the glory hole, and while so employed some rock and earth loosened by the shot in the afternoon and further loosened by the shot fired between the hours of 11:30 P. M. and 12:30 A. M. in a wall adjacent to where the afternoon shot had been fired, fell on him causing the injury complained of in the complaint; that he was under the immediate orders and direction of one Green, who was a shift boss or foreman, and whose duty it was to have barred down the loose rock and gravel that struck and injured him.

(c) Defendant denies all of the above allegations except that plaintiff was employed by defendant, and sets up affirmative defense of contributory negligence, assumption of risk and fellow-servant; plaintiff filed no reply denying the above defenses.

(d) Plaintiff failed to show that any shot had been fired in the afternoon before he began work on his shift and failed to show that any earth had been loosened in the afternoon that should have been barred down, and failed to show that any earth or rock that should have been barred down or that was

loosened by any shot is the earth and rock that struck the plaintiff and injured him, and failed to show that defendant had examined the place.

(e) Plaintiff failed to show the relation of the foreman or shift boss Green to the defendant company and what authority he had or what duties and obligations had been given or delegated to him, and what his duties were.

(f) Plaintiff's own evidence shows that Van Campen was superintendent and manager of said mine; that Green was only a shift boss or foreman; that the plaintiff was an experienced miner capable of earning the highest wages as a miner; that he knew that the shots were fired and that he [189] resumed work without examining the walls or place where he was working; that during the first part of his shift he was bulldozing large rocks with powder in the bottom of the glory hole; that it was part of his duty along with the other workmen to bar down rock, gravel and earth loosened by the firing of shots; that it was a rule of the company that before going to work it was the duty of plaintiff and other workmen to examine the place and if any loose rock or earth was found to bar it down; that he worked from the time of coming out of the hospital until he quit the employment of the company.

II.

That the verdict is against the evidence and the law.

III.

That the amount of damages allowed is excessive and was influenced by passion or prejudice.

IV.

Errors of law occurring in the trial and exceptions made by defendant.

V.

Accident or surprise by which ordinary prudence could not have guarded against.

VI.

In denying defendant's motion for a nonsuit.

VII.

In denying defendant's motion for a directed verdict.

VIII.

For the further reason that the instruction on page 8 regarding who are fellow-servants and right of recovery is erroneous and not the law determining who are fellow-servants.

IX.

For the further reason that the instruction given on page 9 is erroneous and not correct law regarding servant's authority.

X.

For the further reason that the instruction given on [190] page 10 is contrary to law, in that it instructs that in order for employees to be fellow-servants they must all be of the same rank of employees, and one in authority over the plaintiff could not be a fellow-servant.

XI.

For the further reason that the instruction given on page 11 is erroneous, in that it requires the master to furnish a safe place to work.

XII.

For the further reason that the instruction given on page 12 is confusing and incomplete, in that it fails to instruct or tell the jury what certain personal duties are nondelegable.

XIII.

For the further reason that the instruction given on page 13 is contrary to law.

XIV.

For the further reason that the instruction given regarding damages instructs so that the jury might base damages on plaintiff's expectancy or probable length of life when no evidence was introduced as to plaintiff's expectancy or probable length of life.

XV.

For the further reason that the instruction requiring the defendant to prove by the preponderance of evidence its affirmative defense when no reply had been filed or served denying them is erronous and contrary to law, and instructed the jury that it was the duty of the defendant to prove that the plaintiff was a fellow-servant with the one who caused his injury.

WHEREFORE defendant requests that a new trial be granted in this action.

R. J. BORYER,
Attorney for Defendant. [191]

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Nov. 13, 1913. Arthur Lang, Clerk. By K. L. Monahan, Deputy. [192]

In the District Court for the Territory of Alaska, Third Division.

No. 633.

JOHN PEDRIN,

Plaintiff,

vs.

THE BEATSON COPPER COMPANY, a Corporation,

Defendant.

Order Overruling Motion for New Trial.

Defendant's motion for new trial having come on to be heard this the 13th day of November, 1913, and the same having been argued by the attorneys for plaintiff and defendant and duly considered by the Court,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that said motion for a new trial be and the same is hereby denied, to which defendant excepts and exception is allowed.

Done this the 14th day of November, A. D. 1913.

FRED M. BROWN,

Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Nov. 14, 1913. Arthur Lang, Clerk. By Chas. A. Hand, Deputy. Entered Court Journal No. 7, page No. 465. [193]

In the District Court for the Territory of Alaska, Third Division.

No. 633.

JOHN PEDRIN,

Plaintiff,

vs.

THE BEATSON COPPER COMPANY, a Corporation,

Defendant.

Stipulation [Extending Time Forty Days to File Bill of Exceptions].

It is hereby stipulated by and between the attorneys for plaintiff and defendant that the plaintiff have 40 days from the time of the signing and filing of the judgment in this case to prepare, file and present its bill of exceptions and its cost and supersedeas bond for an approval and filing, and that execution on said judgment be stayed in the meantime.

Dated this the 13th day of November, A. D. 1913.

E. E. RITCHIE,
Attorney for Plaintiff.
R. J. BORYER,
Attorney for Defendant.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Nov. 13, 1913. Arthur Lang, Clerk. By Chas. A. Hand, Deputy. [194]

In the District Court for the Territory of Alaska, Third Division.

No. 633.

JOHN PEDRIN,

Plaintiff,

vs.

THE BEATSON COPPER COMPANY, a Corporation,

Defendant.

Order Extending Time for Signing and Filing Bill of Exceptions, etc.

Defendant having moved the Court for an extension of time in which to settle, sign and file bill of exceptions in the above-entitled action, and also to file Cost and Supersedeas Bond and for Stay of Execution, having come on to be heard and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the defendant have forty days from the time of the signing and filing of the Judgment in this case to prepare, file and present its Bill of Exceptions and settling same and Cost and Supersedeas Bond and that execution on said judgment be stayed in the meantime.

Dated this the 14th day of November, A. D. 1913.

FRED M. BROWN,

Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Nov. 14, 1913.

Arthur Lang, Clerk. By Chas. A. Hand, Deputy.
Entered Court Journal No. 7, page No. 464. [195]

[Minutes of Trial—November 10, 1913.]

In the District Court for the Territory of Alaska, Third Division.

No. 633.

JOHN PEDRIN,

Plaintiff,

vs.

THE BEATSON COPPER COMPANY, a Corp.,

Defendant.

Trial by Jury.

Now, on this day, this cause came on regularly for trial; R. J. Boryer appearing for the defendant and E. E. Ritchie appearing for plaintiff; and both sides announcing their readiness for trial, the following proceedings were had and done, to wit: The jury, sworn and selected, are as follows:

1. M. Shinn,
2. Geo. Steward,
3. D. W. Harvey,
4. J. J. Miller,
5. E. L. Judson,
6. T. J. Lane,
7. Dan Wilcey,
8. James Fish,
9. Chas. McCallum,
10. H. A. Ives,
11. A. J. Meals,
12. Elmer Anderson,

WHEREUPON statement was made by E. E. Ritchie, attorney for the plaintiff. Defendant waives statement.

WHEREUPON John Pedrin was sworn and testified in his own behalf.

WHEREUPON John Smith was sworn and testified on behalf of the plaintiff.

WHEREUPON Frank M. Boyle was sworn and testified on behalf of plaintiff.

WHEREUPON John Smith was recalled and testified further on behalf of the plaintiff. [196]

WHEREUPON Wm. Gleason was sworn and testified on behalf of the plaintiff.

WHEREUPON plaintiff rests.

WHEREUPON the plaintiff having submitted the testimony in support of its cause of action and rested and the defendant, at the close of plaintiff's cause, having moved the Court for a judgment of nonsuit against the plaintiff, and the matter having been argued by counsel, the Court takes said motion under advisement to report at the hour of ten o'clock to-morrow.

Whereupon, it being the hour of adjournment and the testimony of the witnesses being incomplete,

It is ordered that the further trial of this cause be continued until to-morrow at the hour of ten o'clock A. M.

Entered Court Journal No. 7, page No. 449.

Special October, 1913, Term—Nov. 10th—23d Court Day. Monday. [197]

[Minutes of Trial—November 11, 1913.]

In the District Court for the Territory of Alaska, Third Division.

No. 633.

JOHN PEDRIN,

Plaintiff,

vs.

THE BEATSON COPPER COMPANY, a Corp.,

Defendant.

Trial Continued.

Now on this day the trial of the above-entitled cause came on again regularly for trial; E. E. Ritchie appearing as attorney for the plaintiff; R. J. Boryer appearing as attorney for the defendant; came the jury heretofore impaneled and sworn herein and being called and each answering to his name, the following proceedings were had and done, to wit:

WHEREUPON, the Court being fully advised in the premises gives his decision and denies said motion for a judgment of nonsuit, and exception is taken and allowed.

Whereupon L. V. Smith was sworn and testified on behalf of the defendant.

Whereupon defendant rests.

Whereupon the plaintiff, offering no testimony in rebuttal, defendant files his written motion for a directed verdict, which said motion is by the Court denied, and exception taken and allowed.

Whereupon arguments were had by counsel for plaintiff and counsel for defendant, the jury are duly

instructed by the Court as to the law in the case, and retire in charge of their sworn bailiffs for deliberation.

Thereafter said jury returning into court, in charge of their sworn bailiffs, and being called and each [198] answering to his name, present by and through their foreman, in their presence, their verdict, which is in words and figures as follows, to wit:

In the District Court for the Territory of Alaska, Third Division.

No. 633.

JOHN PEDRIN

vs.

BEATSON COPPER COMPANY, a Corp.,

Verdict.

We, the jury duly empaneled and sworn in the above-entitled action, do find for the plaintiff and assess his damages at the sum of $4,000.00.

J. J. MILLER,
Foreman.

—which said verdict is ordered filed and entered by the Clerk and the jury is excused from further deliberation herein.

Entered Court Journal No. 7, page No. 452.

Special October, 1913 term—Nov. 11–24th Court Day. Tuesday. [199]

In the District Court for the Territory of Alaska, Third Division.

No. 633.

JOHN PEDRIN,

Plaintiff,

vs.

THE BEATSON COPPER COMPANY, a Corporation,

Defendant.

Petition for Writ of Error.

Comes now the Beatson Copper Company, a corporation, the defendant herein, and complains and states that on the 14th day of November, A. D. 1913, the above-entitled court entered judgment herein in favor of the plaintiff above named, and against the defendant above named, in which judgment, and in the proceedings had prior thereto in the above-entitled cause, certain errors were committed to the prejudice of this defendant, all of which will appear in the detail from the Assignment of Errors which is filed with this petition.

WHEREFORE, this defendant prays that a writ of error issue in its behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of the errors so complained of, and that a transcript of the record and proceedings, with all things concerning the same, duly authenticated, be sent to the United States Circuit Court [200] of Appeals for the Ninth Circuit.

And defendant further prays for an order fixing

the amount of bond for a supersedeas in said cause.

Dated this the —— day of December, A. D. 1913.

R. J. BORYER,
Attorney for Defendant.

Filed in the District Court, Territory of Alaska, Third Division. Dec. 17, 1913. Arthur Lang, Clerk. By K. L. Monahan, Deputy. **[201]**

In the District Court for the Territory of Alaska, Third Division.

No. 633.

JOHN PEDRIN,

Plaintiff,

vs.

THE BEATSON COPPER COMPANY, a Corporation,

Defendant.

Assignment of Errors.

Comes now the defendant below and plaintiff in error in the above-entitled cause and files the following Assignment of Errors upon which it will rely in its prosecution of the Writ of Error in the above-entitled cause:

I.

The Court erred in overruling challenge of plaintiff in error to Juror W. Thomas, to which ruling plaintiff in error duly excepted and its exception was allowed. Said exception is based upon the following testimony:

"Mr. BORYER.—Q. You have heard the case talked of?

A. I heard some of the boys speak of it down here.

Q. Heard who?

A. One of the boys that worked down at the mine.

Q. Did he go into details, how it happened? [202] A. No.

Q. Where was it you heard this conversation?

A. Here in Valdez.

Q. Between whom? A. Mr. Florence.

Q. Who was doing the talking, the plaintiff?

A. No.

Q. Do you recall who it was?

A. Florence was the party's name that was telling me about it—I think he happened to be working down there last winter.

Q. From what you have heard do you feel that you could sit as a juror in this case?

A. I can't say that I should sit; no.

Q. You think you have formed impressions from what you have heard that it would take evidence to remove? A. To a certain extent, yes.

Q. And you don't feel then that you should sit as a juror? A. Why, no, I do not.

Q. You have formed an opinion from what you heard at that time? A. Slightly.

Q. It would take some evidence to remove it?

A. Some evidence.

Mr. BORYER.—We challenge the juror for cause.

(By Mr. RITCHIE.)

Q. So you have now you think an opinion as to the merits? A. Yes, somewhat. [203]

Q. So that you could not start on the trial of the

case as an absolutely impartial juror?

A. No, I could not.

Q. Suppose at a very early stage of the trial it appeared that the purported facts already stated to you were wholly wrong could you then try the case as though you had never heard anything regarding it? A. Yes.

By the COURT.—Do you feel that you could lay aside any opinion you may have and absolutely disregard it and try the case and decide it entirely on the evidence that you hear here in the courtroom?

A. Yes, sir.

By the COURT.—The challenge will be denied.

Defendant is allowed an exception to the ruling."

II.

The Court erred in refusing to instruct the jury to disregard the following testimony of John Pedrin, for the reason that same was hearsay, to which the plaintiff in error duly excepted and its exception was allowed. The testimony was as follows:

"Mr. RITCHIE.—Q. Now, just tell the jury what injuries you received, tell how you were hurt, every hurt you had. **[204]**

A. I got a cut here (indicating).

Q. How big was that cut on the face at the time?

A. They told me it was right to the bone.

Mr. BORYER.—I move to strike that as hearsay—that the answer be stricken and the jury instructed to disregard it.

Motion denied. Defendant allowed an exception."

III.

The Court erred in allowing the following testimony of William Gleason, to which plaintiff in error duly excepted and exception was allowed.

Testimony was as follows:

"Mr. RITCHIE.—Q. Now, where a shot is fired in the walls of a mine, particularly an open mine or a glory hole, is there any rule about making an inspection of the surrounding walls immediately afterwards?

Mr. BORYER.—I object to the question for the reason that it is incompetent and immaterial, and for the further reason that there is no such question raised in the pleadings, and for the further reason that there is nothing in the case that would warrant the asking of such a question and that the defendant would not be bound by any answer made in response to this question.

By the COURT.—I understand there is an allegation in the complaint to the direct effect that [205] the rule of good mining required that such be done, but the question I am not so clear upon is, whose duty it is to do it, whether it is the man who is in danger himself or whether it is the duty of someone else—that is the important question.

After argument the objection as by the Court overruled, to which ruling of the Court counsel for defendant is allowed an exception.

A. Ordinarily.

Q. What is that—what is the usual course of procedure?

Mr. BORYER.—In order to avoid encumbering

the record I want the same objection to go to all similar questions.

(It is so understood and exception allowed.)

A. The rule is that a man has got to bar down his ground to make it safe, not to have loose ground in the walls after a blast—that is, if a man is going to work under it.

Q. Where work is being done under the direction of a foreman or shift boss who looks after that?

Mr. BORYER.—We object to the question for the reason that it is immaterial and incompetent and for the further reason that it has not been shown that this work was under the direction of a shift boss or foreman.

Objection overruled. Defendant allowed an exception.

A. Why, the foreman or shift boss who is in charge." **[206]**

IV.

The Court erred in overruling motion of plaintiff in error made after the defendant in error rested his case for nonsuit, which motion was as follows:

"I.

Because the plaintiff alleges in his complaint that he is an experienced miner, capable of earning the highest wages for mining; that his evidence shows that he has followed mining for several years; that he had worked in and around the place where he was injured ever since beginning work for the defendant company and had been working in the pit or hole where the accident occurred for about two weeks and knew the conditions surrounding the

place where he was working; that he admitted he had seen the driller bore the holes and load same and heard the shots fired at the place or point where his injury happened, and which shot or shots the plaintiff claims in his complaint was the cause of the earth falling and injuring the plaintiff.

II.

For the further reason that the plaintiff himself, although being an experienced miner and knowing that the shots complained of in his complaint had been fired at the place mentioned in his complaint, which caused the injury, proceeded to work without either examining or in any manner trying to ascertain the condition of the place where he was going to work. **[207]**

III.

For the further reason that the plaintiff has failed to show or establish what relation, if any, the foreman or shift boss bore to the defendant and the duties, responsibility and authority of said foreman or shift boss in connection with the defendant company, while the evidence does show that said foreman or shift boss was engaged in a common employment along with the plaintiff and was a fellow-servant.

IV.

For the further reason that the plaintiff has failed to show that the defendant company was negligent in any manner and has failed to establish and make out a case against this defendant."

V.

The Court erred in denying the motion of plaintiff in error made at the close of the case for a directed

verdict on behalf of the defendant, which was excepted to and exception allowed, said motion being as follows:

"I.

Because the plaintiff alleges in his complaint that he is an experienced miner, capable of earning the highest wages for mining; that his evidence shows that he has followed mining for several years; that he had worked in and around the place where he was injured ever since beginning work for the defendant company and had been working in the pit or hole where the accident occurred for about two weeks and knew the conditions surrounding the place where he was [208] working; that he admitted he had seen the driller bore the holes and load them and heard the shots fired at the place or point where his injury happened and which shot or shots the plaintiff claims in his complaint was the cause of the earth falling and injuring the plaintiff.

II.

For the further reason that the plaintiff himself, although being an experienced miner and knowing that the shots complained of in his complaint had been fired at the place mentioned in his complaint, which caused his injury, proceeded to work without either examining or in any other manner trying to ascertain the condition of the place where he was going to work.

III.

For the further reason that the plaintiff had failed to show or establish what relation, if any, the foreman or shift boss bore to the defendant, and the

duties, responsibility and authority of said foreman or shift boss in connection with the defendant company, while the evidence does show that said foreman or shift boss was engaged in a common employment along with the plaintiff and was a fellow-servant.

IV.

For the further reason that the plaintiff has failed to show that the defendant company was negligent in any manner and has failed to establish and make out a case against this defendant.

V.

For the further reason that the defendant in its affirmative defense alleges and pleads that [209] if the plaintiff was injured, such injuries arose from and grew out of the risks incident to his employment and which the plaintiff assumed, also pleading as an affirmative defense that if said plaintiff was injured, such injuries were due to the negligence of the plaintiff himself and or by the negligence of a fellow-servant; that the plaintiff has failed, neglected and refused to deny or otherwise plead to said affirmative defenses, thereby admitting same."

VI.

The Court erred in denying motion of plaintiff in error for judgment for defendant notwithstanding judgment for plaintiff, to which exception was taken and allowed, said motion being as follows:

"I.

Insufficiency of evidence to sustain or justify the verdict in the following particulars:

a. The jury was not justified in finding the de-

fendant guilty of negligence as alleged by the plaintiff, nor in finding against said defendant.

b. That the plaintiff alleged in his complaint that his regular occupation is that of a miner, at which employment he was able to earn and had earned and received the highest going wages as a miner; that while employed as a mucker for defendant in its mine, in a glory hole, he was struck by some earth and rock that fell from the side of a bank that had been loosened by a dynamite charge and that had not been barred down; that the recognized rules of careful and safe mining required that said walls be barred down and that [210] duty devolved upon the mine operator and his vice-principal, the foreman or shift boss directing the work.

The evidence introduced by the plaintiff shows that:

The plaintiff was an experienced miner.

That he had been working in the glory hole for two weeks; knew that the shots had been fired just prior to going to dinner. That he returned immediately after dinner and resumed work under or near the place where the shot or shots had been fired, and did so without making an examination and without taking any precautions whatever, and against the evidence introduced by him in not barring down the loose earth that he complained of, although he and the other witnesses who were called by the plaintiff testified that it was his duty to bar down the loose earth. Plaintiff claims he resumed work after dinner bulldozing rock, by reason of the orders of shift boss or foreman Green. No evidence was in-

troduced that this shift boss or foreman had been instructed or empowered to do any of the positive duties required of the defendant; no evidence was introduced connecting the earth that struck plaintiff with that loosened by the shots complained of or connected with the work.

That the verdict is against the law and evidence."

VII.

The Court erred in denying motion of plaintiff in error for a new trial, which was excepted to and exception [211] allowed, which motion was as follows:

"I.

Insufficiency of evidence to sustain or justify the verdict in the following particulars:

(a) That the jury was not justified in finding defendant guilty of any negligence as alleged by the plaintiff nor in finding against said defendant.

(b) That the plaintiff based his cause of action upon the following facts: That on or about February 1st, 1913, plaintiff, while employed by defendant company, was at work in glory hole of defendant's mine; that he went to dinner about 11:30 P. M. and returned to work about 12:30 A. M.; that after quitting work to go to dinner at 11:30 P. M. a shot was fired in the glory hole which further loosened some rock, gravel and earth that had been loosened prior to his going to work at 7 P. M. of that day; that when he returned from dinner about 12:30 A. M. he was ordered by the shift boss or foreman to resume immediately his work of bulldozing at the bottom of the glory hole, and while so employed some rock

and earth loosened by the shot in the afternoon and further loosened by the shot fired between the hours of 11:30 P. M. and 12:30 A. M. in a wall adjacent to where the afternoon shot had been fired, fell on him, causing the injury complained of in the complaint; that he was under the immediate orders and direction of one Green who was a shift boss or foreman and whose duty it was to have barred down the loose rock and gravel that struck and injured him.

(c) Defendant denies all of the above [212] allegations except that plaintiff was employed by defendant and sets up affirmative defense of contributory negligence, assumption of risk and fellow-servant; plaintiff filed no reply denying the above defenses.

(d) Plaintiff failed to show that any shot had been fired in the afternoon before he began work on his shift and failed to show that any earth had been loosened in the afternoon that should have been barred down, and failed to show that any earth or rock that should have been barred down or that was loosened by any shot is the earth and rock that struck the plaintiff and injured him, and failed to show that defendant had examined the place.

(e) Plaintiff failed to show the relation of the foreman or shift boss Green to the defendant company and what authority he had or what duties and obligations had been given or delegated to him, and what his duties were.

(f) Plaintiff's own evidence shows that Van Campen was superintendent and manager of said mine; that Green was only a shift boss or foreman;

that the plaintiff was an experienced miner, capable of earning the highest wages as a miner; that he knew that the shots were fired and that he resumed work without examining the walls or place where he was working; that during the first part of his shift he was bulldozing large rocks with powder in the bottom of the glory hole; that it was part of his duty along with the other workmen to bar down rock, gravel and earth loosened by [213] the firing of shots; that it was a rule of the company that before going to work it was the duty of plaintiff and other workmen to examine the place, and if any loose rock or earth was found to bar it down; that he had worked from the time of coming out of the hospital until he quit the employment of the company.

II.

That the verdict is against the evidence and the law

III.

That the amount of damage allowed is excessive and was influenced by passion or prejudice.

IV.

Errors of law occurring in the trial and exceptions made by defendant.

V.

Accident or surprise by which ordinary prudence could not have guarded against.

VI.

In denying defendant's motion for a nonsuit.

VII.

In denying defendant's motion for a directed verdict.

VIII.

For the further reason that the instruction on page 8 regarding who are fellow-servants and right of recovery is erroneous and not the law determining who are fellow-servants. [214]

IX.

For the further reason that the instruction given on page 9 is erroneous and not correct law regarding servant's authority.

X.

For the further reason that the instruction given on page 10 is contrary to law in that it instructs that in order for employees to be fellow-servants they must all be of the same rank of employees and one in authority over the plaintiff could not be a fellow-servant.

XI.

For the further reason that the instruction given on page 11 is erroneous in that it requires the master to furnish a safe place to work.

XII.

For the further reason that the instruction given on page 12 is confusing and incomplete, in that it fails to instruct or tell the jury what certain impersonal duties are nondelegable.

XIII.

For the further reason that the instruction given on page 13 is contrary to law.

XIV.

For the further reason that the instruction given regarding damages instructs so that the jury might base damages on plaintiff's expectancy or probable

length of life when no evidence was introduced as to plaintiff's expectancy or probable length of life.

XV.

For the further reason that the instruction requiring the defendant to prove by the preponderance of evidence its affirmative defense when no reply had [215] been filed or served denying them is erroneous and contrary to law, and instructed the jury that it was the duty of the defendant to prove that the plaintiff was a fellow-servant with the one who caused his injury."

VIII.

The Court erred in giving the following instruction, which was excepted to by plaintiff in error and exception allowed:

"Instruction:

Fellow-servant:

The Court instructs the jury that in order to constitute servants of the same master fellow-servants, it is essential that they should be at the time of the injury directly co-operating with each other in the particular business in hand or that their duties shall bring them into habitual association, so that they may exercise an influence upon each other promotive of proper caution."

IX.

The Court erred in giving the following instruction, which was excepted to by plaintiff in error and exception allowed:

"Instruction:

You are further instructed that if you believe from a preponderance of evidence that the defend-

ant was guilty of negligence, as alleged in the plaintiff's complaint, and the plaintiff by reason thereof was injured and damaged as claimed by him, and that he himself was guilty of no want of ordinary care that contributed to the injury, then the defendant is liable in this action, although you may further believe from the evidence that the negligence of a fellow-servant contributed to such injury."

X.

The Court erred in giving the following instruction, which was excepted to by plaintiff in error and exception allowed: [216]

"Instruction:

Vice-principal:

You are instructed that when an injury results to a servant from an order improperly given or act negligently done, and the person who gives the order or does the act is in performance of a duty, the breach of which by the master in person would create a liability, and he is clothed with apparent authority in that respect, and the order given or act done is within the scope of the apparent authority, the master is responsible in damages to the injured servant if the injured servant is in the exercise of due care and caution for his own safety. It is immaterial whether the person exercising the authority was known as a foreman or by any other title; if he is clothed with apparent authority to direct and command, and the injured servant in good faith obeys and performs, the person so exercising such authority is not as to the person injured a fellow-servant in the sense that the common master is relieved of responsibility for in-

juries resulting from his imprudent conduct or negligent act."

XI.

The Court erred in giving the following instruction, which was excepted to by plaintiff in error and exception allowed:

"Instruction:

The rule of law known as the fellow-servant rule has no application to this case unless you find that the plaintiff was injured through the negligence of a fellow-workman not in authority over him. If you find that there was negligence on the part of another employee of the company and the negligent person had charge of the work in the glory hole and control over the men working there, he was not a fellow-servant, but what is known in law as a vice-principal. [217] Any duty which the master is bound to perform for the safety of his servants he cannot escape responsibility for by delegating the performance to a subordinate. The duty of providing a safe place to work cannot be shifted by the master and the agent representing the master in the premises must perform that duty, and if he fails through negligence, the negligence is that of the master."

XII.

The Court erred in giving the following instruction, which was excepted to by plaintiff in error and exception allowed:

"Instruction:

Assumption of risk is a rule of law which imposes upon an employee risk of the ordinary dangers of his employment. That is, the dangers necessarily at-

tendant upon the employment and hazard of accidents which may occur in course of its employment after all reasonable safeguards for the prevention of accidents have been adopted. The employee who accepts service in a dangerous employment assumes the risk of accidents which may occur notwithstanding the usual and approved safeguards have been taken to avoid them. But if the employer fails to adopt reasonable precautions to prevent accidents by exercising care corresponding to the hazards of the business, by providing a safe place to work and safe appliances and tools, he is liable to resulting injury to employees if his negligence is the direct and immediate cause of the injury or is an efficient cause in its occurrence. The law of contributory negligence, which fixes the blame upon an employee for an accident resulting in his injury, where the failure on his part contributes to the mishap, does not excuse the employer, if the accident could not have [218] happened or the injury resulted but for the conditions arising from the employer's negligence."

XIII.

The Court erred in giving the following instruction, which was excepted to by plaintiff in error and exception allowed:

"Instruction:

Certain duties are said to be nondelegable. By this is meant that such duties are personal to the master, and he cannot delegate them to a servant and then escape liability, if the servant fails to perform or negligently performs the duty, on the ground

that the negligent servant was a fellow-servant of the injured servant. The rule is that if a duty is personal to the master the one to whom he entrusts the performance of this duty is called a vice-principal, and the master is liable for his negligence in relation to such duties."

XIV.

The Court erred in giving the following instruction, which was excepted to by plaintiff in error and exception allowed:

"Instruction:

A servant is not guilty of contributory negligence when he is injured by an accident which could not happen in the ordinary course of the employment in which he is engaged, if the master had taken reasonable care to avoid the accident or to prevent the conditions which made it possible, even though its possibility is known to the servant, because he has a right to rely upon the belief that the master will not allow needlessly unsafe conditions to exist." [219]

XV.

The Court erred in giving the following instruction, which was excepted to by plaintiff in error and exception allowed:

"Instruction:

On the question of damages you are instructed that if you find by a preponderance of the evidence that the allegations of the plaintiff's complaint were true and that the plaintiff was injured by the negligence of the defendant and while exercising reasonable and ordinary care for his own safety, as explained to you in these instructions, you will then

consider the question of the damages which the plaintiff is entitled to recover, and in considering this, you may consider the nature and degree of the injuries received by the plaintiff, whether or not they are permanent and prevent the plaintiff from following his occupation, to wit, that of a miner; his physical condition and age at the time of the accident; the wages he was able to earn; the suffering caused him by such injuries and his expectancy or probable length of life; and also the loss to him by his inability to earn a living by being able to follow his said vocation, if you find by reason of such injuries that he is unable to do so."

XVI.

The Court erred in giving the following instruction, which was excepted to by plaintiff in error and exception allowed:

"Instruction:

In this case your verdict should be in accordance with the preponderance of the evidence; that is to say, a person who affirmatively alleges a thing has the burden of proof as to that particular thing and must prove the **[220]** same by a preponderance of the evidence. And in this case it is incumbent upon the plaintiff to establish by a preponderance of the evidence all of the affirmative allegations of his complaint; and it is incumbent upon the defendant to establish by a preponderance of the evidence all the affirmative allegations set up in its answer.

The preponderance of the evidence means the weight of the evidence and if the scales are equally balanced between the parties on any question at

issue, you should determine that question or issue against the one having the affirmative of that particular question or issue."

XVII.

The Court erred in refusing to give instruction No. 2 requested by appellant, to which exception was taken and allowed. Said instruction was as follows:

"Instruction No. 2:

You are instructed that the plaintiff bases his cause of action upon the defendant's negligence in that the plaintiff claims that the defendant negligently, recklessly and wantonly failed and neglected to make sufficient examination of the wall in the glory hole where the plaintiff was working after shots had been fired in said glory hole and to bar down all loose rock and earth adhering to said wall, or to remove from the wall all loose portions unsettled by the shots mentioned in the complaint. You are instructed that before the plaintiff can recover in this action it will be necessary for him to prove by the preponderance of the evidence that the defendant did not make sufficient examination of the wall complained of in the complaint, from which the rock and earth had been detached, and prove that at or before the time he entered **[221]** this place to perform his work that there was loose rock and earth adhering to the wall, and must further prove that the defendant failed to remove from the wall all loose portions unsettled by the shots mentioned in the complaint and still adhering to the wall, and unless the plaintiff establishes these facts by the preponderance of the evidence, you are instructed he

cannot recover in this action."

XVIII.

The Court erred in refusing to give instruction No. 3 requested by the appellant, to which exception was taken and allowed. Said instruction was as follows:

"Instruction No. 3:

You are instructed that before the plaintiff can recover in this action he must show that he exercised ordinary and reasonable care, that is, such care as an ordinary, prudent person would exercise under the same circumstances, the degree of care which must be taken by the plaintiff must be adjusted to the character of the work and it should be commensurate with the dangers of the employment."

XIX.

The Court erred in refusing to give instruction No. 4 requested by the appellant, to which exception was taken and allowed. Said instruction was as follows:

"Instruction No. 4:

You are instructed that if you find from the evidence there was a rule in existence at the defendant's mine requiring all workmen to examine the place or places where they were working to see that such places were safe to work in and about, you are then instructed that the law presumes this rule was known to the plaintiff at the time he was injured and when he entered the place where he was injured."

[222]

XX.

The Court erred in refusing to give Instruction

No. 5 requested by appellant, to which exception was taken and allowed. Said instruction was as follows:

"Instruction No. 5:

You are instructed that if it was the duty of the plaintiff to make safe or assist in making safe the place where he was working as the work progressed, then the plaintiff cannot recover in this action."

XXI.

The Court erred in refusing to give Instruction No. 6, requested by appellant, to which exception was taken and allowed. Said instruction was as follows:

"Instruction No. 6:

You are instructed that if it was the duty of the plaintiff to assist and help to bar down the loose earth, gravel and rock that caused his injury and he failed to do so, the plaintiff cannot recover in this action."

XXII.

The Court erred in refusing to give Instruction No. 8, requested by appellant, to which exception was taken and allowed. Said instruction was as follows:

"Instruction No. 8:

You are instructed that the plaintiff alleges in his complaint that he was a miner and capable of earning the highest going wages paid to miners when opportunity offered, therefore he cannot recover for his injuries if same were caused by his inattention to his surroundings and failure to take due precautions against known or obvious dangers." [223]

XXIII.

The Court erred in refusing to give Instruction No. 9 requested by appellant, to which exception was taken and allowed. Said instruction was as follows:

"Instruction No. 9:

You are instructed that if it was the duty of the plaintiff in this action to inspect the place where he was working to see if it was safe to work at the place or point where he was working, and he failed to make this inspection, you are instructed he cannot recover in this action."

XXIV.

The Court erred in refusing to give Instruction No. 10 requested by appellant, to which exception was taken and allowed. Said instruction was as follows:

"Instruction No. 10:

You are instructed that if the plaintiff knew, or if the dangers connected with the work were so patent and obvious that he either knew, or in the exercise of ordinary care should have known of their existence, he assumes the risk of injury from the dangers and defects of which he complains in his complaint."

XXV.

The Court erred in refusing to give Instruction No. 13 requested by appellant, to which exception was taken and allowed. Said instruction was as follows:

"Instruction No. 13:

You are instructed that if the plaintiff had actual or constructive knowledge of the dangers or unsafe

condition of the place and he failed to take such precautions as a reasonably prudent man under similar circumstances would exercise to avoid the dangers, and is injured by reason of his failure to use such ordinary **[224]** care, he is guilty of contributory negligence and cannot recover in this action."

XXVI.

The Court erred in refusing to give Instruction No. 16 requested by appellant, to which exception was taken and allowed. Said instruction was as follows:

"Instruction No. 16:

You are instructed that all persons who serve the same master, work under the same control, deriving authority and compensation from the same source and are engaged in the same general business, although it may be in different grades or departments of it, are fellow-servants."

XXVII.

The Court erred in refusing to give Instruction No. 17 requested by appellant, to which exception was taken and allowed. Said instruction was as follows:

"Instruction No. 17:

You are instructed that if the defendant by any of its agents, or servants, carefully examined the glory hole after the shots alleged in the complaint were fired and the person or persons making this examination thought or pronounced it safe, and such person or persons were coworkers and fellow-servants of the plaintiff, you are instructed the plaintiff

cannot recover in this action."

XXVIII.

The Court erred in refusing to give Instruction No. 18 requested by appellant, to which exception was taken and allowed. Said instruction was as follows:

"Instruction No. 18:

You are instructed that the plaintiff alleges in his complaint that "he is a miner by occupation, at which [225] employment he was able to earn when opportunity offered, and had earned and received, the highest wages as a miner." This allegation you must consider as true as there has been no evidence offered by the defendant to contradict this allegation. Therefore, if you find from the evidence that the plaintiff prior to receiving the injuries complained of, had knowledge, or from his experience and knowledge imputed to him as a miner, had knowledge of facts such as would lead a man of his experience and knowledge to believe that there was danger of injury from falling rocks and earth at the place where the injury occurred, and with such knowledge he continued to work without notifying the proper officers of the defendant company of such danger and while continuing to work at this place received the injury complained of, then, in that case, you are instructed the plaintiff cannot recover in this action."

XXIX.

The Court erred in refusing to give Instruction No. 20 requested by appellant, to which exception

was taken and allowed. Said instruction was as follows:

"Instruction No. 20:

You are instructed that before you can find that shift boss or foreman Green was a vice-principal and that it was his duty as such foreman to provide a reasonably safe place for the men under his direction to work and to see and provide after a shot was fired in the wall of the glory hole no loosened fragments were allowed to remain upon the wall from which they might without warning be detached, it is necessary that you first find from the evidence introduced by the plaintiff that the defendant corporation entrusted this duty upon this foreman, and unless you find from the evidence that the defendant corporation did delegate to shift **[226]** boss or foreman Green the duty of providing the place for work for the plaintiff, and require of him to provide that after a shot was fired in the wall of the glory hole no loosened fragments were allowed to remain upon the wall, you are instructed the plaintiff cannot recover in this action by reason of any negligence of shift boss or foreman Green."

XXX.

The Court erred in refusing to give Instruction No. 21 requested by appellant, to which exception was taken and allowed. Said instruction was as follows:

"Instruction No. 21:

You are instructed that if you find from the evidence that it was the duty of the plaintiff and his fellow-workmen to make safe the place of work as

it progressed and to bar down all loosened rock and earth after shots had been fired, the master's or defendant's duty is fulfilled when he furnishes them with suitable material and implements for doing this work, and if the plaintiff or any of his fellow-servants failed or neglected to make the place safe, or failed to bar down the loose earth and gravel which caused the plaintiff's injury, he cannot recover in this action."

XXXI.

The Court erred in refusing to give Instruction No. 22 requested by appellant, to which exception was taken and allowed. Said instruction was as follows:

"Instruction No. 22:

You are instructed that the plaintiff in this case has introduced in evidence that by the rules of the defendant company it was the duty of the plaintiff along with the other men working with him to assist in and bar down the loose rock, earth and gravel left after the shots had been fired, the plaintiff having introduced this in evidence he is **[227]** bound by it where there is no evidence to the contrary, therefore, you are instructed if this rule made it the duty of the plaintiff to assist in and bar down the loose rock, earth and gravel that fell and injured him and he failed, neglected or refused to do so and was injured by reason of said earth, rock and gravel falling down and striking him, you are instructed he cannot recover in this case."

XXXII.

The Court erred in refusing to give Instruction

No. 23 requested by appellant, to which exception was taken and allowed. Said instruction was as follows:

"Instruction No. 23:

You are instructed that the plaintiff failed to introduce in evidence what, if any, power or authority the shift boss or foreman Green had, or what authority or power or what duties the defendant company had entrusted to him or that he had authority or right to give any order or command which violated any rule of the company or prevented any rule of the company being carried out or that he had authority, or it was his duty to see or do anything regarding the safety of the place where the men were working; therefore, you are instructed that if the rules of the defendant company required the plaintiff, along with the other men working with him, to assist in and bar down the loose earth, rock and gravel left after the shots had been fired, you are instructed that it was the duty of the plaintiff to assist in and bar down the loose earth, rock and gravel, that afterwards fell and struck him causing the injury, and this is true although the shift boss or foreman Green instructed him to start bulldozing, and if he failed or neglected to bar down the loose rock earth and gravel that struck him, he cannot [228] recover in this action."

XXXIII.

The Court erred in refusing to give Instruction No. 24 requested by appellant, to which exception was taken and allowed. Said instruction was as follows:

"Instruction No. *33:*

You are instructed that the plaintiff has failed to introduce or show in evidence that the shift boss or foreman Green advised or told the plaintiff that he need not bar down the loose rock and earth that the plaintiff claims struck him or that anyone else told him this or informed him that the shift boss or foreman Green had said not to bar down the loose rock and gravel that struck the plaintiff; therefore you are instructed that if the rule of the company required that he do or assist in barring down this earth, you are instructed that it was the duty of the plaintiff to do so although the foreman had advised him to begin bulldozing, and if he failed to bar down said earth, rock and gravel and was injured by reason of said earth, rock and gravel not being barred down, you are instructed he cannot recover in this action."

XXXIV.

The Court erred in refusing to give Instruction No. 25 requested by appellant, to which exception was taken and allowed. Said instruction was as follows:

"Instruction No. 25:

You are instructed that no evidence was introduced showing that the earth which struck the plaintiff causing the injury was earth or rock that had been loosened by the shots that had been fired at the time alleged in the complaint to have been fired or that the earth and rock which struck the plaintiff was earth and rock [229] that should have been barred down or looked after by the defendant, and

before you can find for the plaintiff in this case it is necessary that he prove that the earth and rock which struck him was earth and rock that had been loosened by the shots complained of in the complaint and that should have been barred down, and unless you so find from the evidence introduced in this case, you are instructed the plaintiff cannot recover."

WHEREFORE, the defendant, plaintiff in error, prays that said judgment may be rendered, vacated and set aside, and that the verdict found by the jury on which said judgment was based may be vacated and set aside, and for such other and further relief or both in the premises as may be proper.

R. J. BORYER,
Attorney for The Beatson Copper Company.

Filed in the District Court, Territory of Alaska, Third Division. Dec. 17, 1913. Arthur Lang, Clerk. By K. L. Monahan, Deputy. **[230]**

In the District Court for the Territory of Alaska, Third Division.

No. 633.

JOHN PEDRIN,
Plaintiff,

vs.

THE BEATSON COPPER COMPANY, a Corporation,
Defendant.

Order Allowing, Settling and Certifying Bill of Exceptions.

It appearing to the Court that the defendant has

prepared and duly served upon the attorney for the plaintiff herein, within due time, a proposed Bill of Exceptions, and the Judge of said court having duly designated the 17th day of December, 1913, as the time at which he would settle the Bill of Exceptions, and both parties having been informed of the time for settling the Bill of Exceptions as designated by the Judge, and the matter coming regularly on for hearing for the purpose of settling the said Bill of Exceptions on the 17th day of December, 1913, and attorneys for both parties having been present:

It was thereupon, and is hereby, ordered that the proposed Bill of Exceptions be allowed, the same shall be and is hereby settled and allowed as a Bill of Exceptions herein and presented to the Judge of this court for his certificate. **[231]**

And it further appearing to the Court that said proposed Bill of Exceptions conforms to the truth and is in proper form, it is therefore ordered that the said bill is a true Bill of Exceptions, and the same is hereby approved, allowed and settled, and ordered filed and made a part of the record of said cause.

Done in open court this the 17th day of December, A. D. 1913.

FRED M. BROWN,
Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Dec. 17, 1913. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

Entered Court Journal No. 8, page No. 62. **[232]**

In the District Court for the Territory of Alaska, Third Division.

No. 633.

JOHN PEDRIN,

Plaintiff,

vs.

THE BEATSON COPPER COMPANY, a Corporation,

Defendant.

Order Allowing Writ of Error.

On this day came the defendant, the Beatson Copper Company, a corporation, by its attorney, and filed herein and presented to the Court its petition praying for the allowance of a Writ of Error, and an assignment of errors to be urged by it, praying also that a transcript of the record and proceedings in said cause, with all things concerning the same, be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and that the amount of bond for supersedeas in said cause be fixed. On consideration whereof, the Court does hereby allow a Writ of Error as prayed for.

Dated this 17th day of December, A. D. 1913.

FRED M. BROWN,

Judge of the District Court for the Territory and District of Alaska, Third Division.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Dec. 17, 1913. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

Entered Court Journal No. 8, page No. 63. **[233]**

In the District Court for the Territory of Alaska, Third Division.

No. 633.

JOHN PEDRIN,

Plaintiff,

vs.

THE BEATSON COPPER COMPANY, a Corporation,

Defendant.

Writ of Error [Original].

The President of the United States of America, to the Honorable Judge of the District Court for the Territory and District of Alaska, Third Division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment upon a verdict, which is in the said District Court before you, or some of you, between John Pedrin, the original plaintiff and the defendant in error, and the Beatson Copper Company, the original defendant and the plaintiff in error, manifest error hath happened to the damage of the said Beatson Copper Company, plaintiff in error, as by its answer appears we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same to the United States **[234]** Circuit Court

of Appeals for the Ninth Judicial Circuit, together with this writ, so that you have the same in San Francisco, in said circuit, on the 16th day of January, A. D. 1914, and that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein, to correct that error, what of right and according to law and custom of the United States should be done.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, the 17th day of December, in the year of our Lord one thousand nine hundred and thirteen.

ARTHUR LANG,
Clerk.

By T. P. Geraghty,
Deputy Clerk of the District Court for the Territory and District of Alaska, Third Division.

Allowed by:

FRED M. BROWN,
Presiding Judge in the District Court for the Territory and District of Alaska, Third Division.

Copy of this Writ of Error received and service of original acknowledged this the 17th day of December A. D. 1913.

E. E. RITCHIE,
Attorney for Defendant in Error.

Filed in the District Court, Territory of Alaska, Third Division. Dec. 17, 1913. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. [235]

In the District Court for the Territory of Alaska, Third Division.

No. 633.

JOHN PEDRIN,

Plaintiff,

vs.

THE BEATSON COPPER COMPANY, a Corporation,

Defendant.

Writ of Error [Copy].

The President of the United States of America, to the Honorable Judge of the District Court for the Territory and District of Alaska, Third Division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment upon a verdict, which is in the said District Court before you, or some of you, between John Pedrin, the original plaintiff and the defendant in error, and the Beatson Copper Company, the original defendant and the plaintiff in error, manifest error hath happened to the damage of the said Beatson Copper Company, plaintiff in error, as by its answer appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the United States **[236]** Circuit Court of Appeals for the Ninth Judicial Circuit, together

with this writ, so that you have the same in San Francisco, in said circuit, on the 16th day of January, A. D. 1913, and that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein, to correct that error, what of right and according to law and custom of the United States should be done.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, the 17th day of December, in the year of our Lord one thousand nine hundred and thirteen.

ARTHUR LANG,
Clerk.

By T. P. Geraghty,
Deputy Clerk of the District Court for the Territory and District of Alaska, Third Division.

Allowed by:

FRED M. BROWN,
Presiding Judge in the District Court for the Territory and District of Alaska, Third Division.

Copy of this Writ of Error received and service of original acknowledged this the 17 day of December. A. D. 1913.

E. E. RITCHIE,
Attorney for Defendant in Error.

Filed in the District Court, Territory of Alaska, Third Division. Dec. 17, 1913. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. [237]

In the District Court for the Territory of Alaska, Third Division.

No. 633.

JOHN PEDRIN,

Plaintiff,

vs.

THE BEATSON COPPER COMPANY, a Corporation,

Defendant.

Bond on Writ of Error [Original.]

KNOW ALL MEN BY THESE PRESENTS, That the Beatson Copper Company, defendant in the above-entitled action as principal, and American Surety Co., of New York, N. Y., duly authorized to do business in Alaska and to sign bonds, as surety, are held and firmly bound unto John Pedrin, plaintiff and defendant in error in the above-entitled cause in the penal sum of Five Thousand Dollars ($5,000.00), lawful money of the United States of America, to be paid to the said John Pedrin, his successors or assigns, his executors and administrators, for which payment, well and truly to be made, we bind ourselves and each of us, and severally, and our and each of our successors and assigns, firmly by these presents.

Sealed with our seals and dated this the 17th day of December, A. D. 1913.

The condition of the foregoing obligation is such that,

WHEREAS, the said Beatson Copper Company, a

corporation, [238] defendant in said cause, as above-named principal obligator, is suing out a Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment in the above-entitled cause entered November 14th, 1913, by the District Court of the United States for the District Court for the District and Territory of Alaska, Third Division, in favor of said plaintiff and against said defendant for the sum of Four Thousand Dollars ($4,000.00) and costs, and

WHEREAS the said principal obligator desires to give good and sufficient security in accordance with the statute in such cases made and provided for, all costs and damages to be occasioned by said Writ of Error and to operate as a supersedeas upon such judgment and stay the execution thereof pending the hearing and decision of said Circuit Court of Appeals upon said Writ of Error,

NOW, THEREFORE, the condition of this obligation is such that if the above-bounden principal obligator, defendant in said cause, shall prosecute said Writ of Error to effect, and if it fails to make good its plea, shall answer all damages, interest and costs, then this obligation shall be void; otherwise to remain in full force and effect.

AMERICAN SURETY CO.,
By A. J. SIGSBY,
Agent.

THE BEATSON COPPER COMPANY, a Corporation.

By R. J. BORYER,
Atty. for the Beatson Copper Co., Inc.

Approved 17th day of December 1913.

FRED M. BROWN,

Judge, Third Division Territory of Alaska. **[239]**

Filed in the District Court, Territory of Alaska, Third Division. Dec. 17, 1913. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

In the District Court for the Territory of Alaska, Third Division.

No. 633.

JOHN PEDRIN,

Plaintiff,

vs.

THE BEATSON COPPER COMPANY, a Corporation,

Defendant.

Citation [on Writ of Error (Copy)].

United States of America.

The President of the United States to John Pedrin, Greeting:

You are cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit at the courtroom of said court, in the city of San Francisco, in the State of California, within thirty days after the date of this citation, pursuant to writ of error filed in the Clerk's office of the District Court for the Territory of Alaska, Third Division, wherein the Beatson Copper Company is plaintiff in error, and you are the defendant in error, to show cause, if any there be, why the

judgment in said writ of error mentioned should not be corrected and speedy justice not be done to the parties in that behalf.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United [240] States, the 17 day of December, in the year of our Lord one thousand nine hundred and thirteen.

FRED M. BROWN,

Judge in the District Court for the Territory and District of Alaska, Third Division.

Copy of this Citation received and service of original acknowledged this the 17th day of December A. D. 1913.

E. E. RITCHIE,

Attorney for Defendant in Error.

Filed in the District Court, Territory of Alaska, Third Division. Dec. 17, 1913. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

Entered Court Journal No. 8, page No. 63. [241]

In the District Court for the Territory of Alaska, Third Division.

No. 633.

JOHN PEDRIN,

Plaintiff,

vs.

THE BEATSON COPPER COMPANY, a Corporation,

Defendant.

Citation [on Writ of Error (Copy).]

United States of America.

The President of the United States to John Pedrin, Greeting:

You are cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit at the courtroom of said court, in the city of San Francisco, in the State of California, within thirty days after the date of this citation, pursuant to writ of error filed in the Clerk's office of the District Court for the Territory of Alaska, Third Division, wherein the Beatson Copper Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice not be done to the parties in that behalf.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United [242] States, the 17 day of December, in the year of our Lord one thousand nine hundred and thirteen.

FRED M. BROWN,

Judge in the District Court for the Territory and District of Alaska, Third Division.

Copy of this Citation received and service of original acknowledged this the 17th day of December, A. D. 1913.

E. E. RITCHIE,

Attorney for Defendant in Error.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Dec. 17, 1913. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

Entered Court Journal No. 8, page No. 63. **[243]**

In the District Court for the Territory of Alaska, Third Division.

No. 633.

JOHN PEDRIN,

Plaintiff,

vs.

THE BEATSON COPPER COMPANY, a Corporation,

Defendant.

Acknowledgment of Service of Papers on Writ of Error.

Service of the Petition for Writ of Error, Order Allowing Writ of Error, of the Assignment of Errors, of the Bond on Writ of Error, of the Citation on Writ of Error, and of Writ of Error in the above-entitled cause, filed in the above-entitled court, on the 17 day of December A. D. 1913, is hereby acknowledged, and receipt of true copies thereof on this 17th day of December A. D. 1913, is also acknowledged.

E. E. RITCHIE,
Attorney for Defendant in Error.

Filed in the District Court, Territory of Alaska, Third Division. Dec. 17, 1913. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. **[244]**

In the District Court for the Territory of Alaska, Third Division.

No. 633.

JOHN PEDRIN,

Plaintiff,

vs.

THE BEATSON COPPER COMPANY, a Corporation,

Defendant.

Certificate to Bill of Exceptions.

I, Fred M. Brown, Judge of the above-entitled court, do hereby certify that the above and foregoing Bill of Exceptions in the above-entitled cause is a true Bill of Exceptions, and the same has been approved, allowed and settled, and ordered filed and made a part of the record of said cause.

Done in open court this the 17 day of December, A. D. 1913.

FRED M. BROWN,
Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Dec. 17, 1913. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

Entered Court Journal No. 8, page No. 64. [245]

In the District Court for the Territory of Alaska, Third Division.

Certificate of Clerk U. S. District Court to Record.

United States of America,
Territory of Alaska,
Third Division,—ss.

I, Arthur Lang, Clerk of the District Court, Territory of Alaska, Third Division, do hereby certify that the above and foregoing, and hereto annexed 250 pages, numbered from 1 to 250, inclusive, are a full, true and correct transcript of the records and files of the proceedings in the above-entitled cause, as the same appears on the records and files in my office;

That this transcript is made in accordance with the defendant's and appellant's praecipe on file herein.

I further certify that the foregoing transcript has been prepared, examined and certified to by me and that the cost thereof, amounting to $110.70, was paid to me by R. J. Boryer, attorney for defendant and appellant herein.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of this court at Valdez, Alaska, this 18th day of December, A. D. 1913.

[Seal] ARTHUR LANG,
Clerk. **[246]**

In the District Court for the Territory of Alaska, Third Division.

No. 633.

JOHN PEDRIN,

Plaintiff,

vs.

THE BEATSON COPPER COMPANY, a Corporation,

Defendant.

Amended Praecipe for Transcript.

To the Clerk of the Above-entitled Court:

You will please make, certify and transmit forthwith to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, at San Francisco, a copy of the record in the above-entitled cause as a return to the Writ of Error *herebefore* sued out of said Circuit Court of Appeals to review the judgment in said cause, consisting of the following files and records and proceedings in said cause:

Complaint.

Answer.

Motion for Nonsuit.

Minute Order Denying Motion for Nonsuit, Exception Taken and Allowed.

Motion for Directed Verdict.

Minute Order Denying Same and Exception Taken and Allowed.

Defendant's Requested Instructions.

Verdict.

Judgment.

Defendant's Exceptions to Court's Instructions to Jury.

Motion for Judgment for Defendant Notwithstanding Judgment for Plaintiff.

Order Overruling Same.

Motion for New Trial.

Order Overruling Same.

Stipulation and Order Extending Time to Settle Bill of Exceptions, With Certificate. [247]

Order Settling and Allowing Bill of Exceptions.

Certificate of Judge to Bill of Exceptions.

Petition for Writ of Error.

Order Allowing Writ of Error.

Assignment of Errors.

Bond for Costs and Supersedeas on Writ of Error.

Writ of Error and Copy.

Citation and Copy of Citation.

Acceptance of Service of Papers on Writ of Error.

This Praecipe.

R. J. BORYER,
Attorney for Defendant.

Filed in the District Court, Territory of Alaska, Third Division. Dec. 18, 1913. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. [248]

[Endorsed]: No. 2360. United States Circuit Court of Appeals for the Ninth Circuit. The Beatson Copper Company, a Corporation, Plaintiff in Error, vs. John Pedrin, Defendant in Error. Transcript of Record. Upon Writ of Error to the United

States District Court of the Territory of Alaska, Third Division.

Received and filed December 27, 1913.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.